Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

STRATA HEIGHTS INTERNATIONAL CORPORATION,
STRATA ENERGY RESOURCES CORPORATION
AND HEIGHTS ENERGY CORPORATION,
Petitioners,

v.

PETROLEO BRASILEIRO, S.A.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a contract between United States corporations and an foreign corporation there is a forum selection clause that mandates that disputes concerning or relating to the contract be resolved in arbitration in a foreign country. The contract has a survivability clause that does not provide for the extension of the forum selection clause. After the termination of the contract, does the forum selection clause govern every other subsequent contract or tortious act between those entities?

2. What is a court of appeal's proper standard of review over a district court's order on a motion to dismiss due to a forum selection clause?

3. What is the proper procedural vehicle to raise a forum selection clause issue?

PARTIES TO THE PROCEEDINGS

Petitioners

1. The Petitioners in this case are Strata Heights International, Corporation, Strata Energy Resources, Corporation and Heights Energy Corporation. Petitioners are not related to any other publicly held or publicly-traded companies.

Respondent

2. Respondent is Petroleo Brasileiro, S.A.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Plaintiffs-Appellees Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (hereinafter referred to collectively as "Strata") respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I. DECISIONS BELOW

The opinion of the Court of Appeals is an unpublished opinion and is reproduced in Appendix B. The decision and order of the District Court is unpublished and adopts an opinion of a magistrate judge and is reproduced in Appendix C. The magistrate judge's opinion is reproduced in Appendix D. The Court of Appeals order denying the petition for panel rehearing is unreported and is reproduced in Appendix A.

II. JURISDICTION

The jurisdiction of the United States District Court for the Southern District of Texas was invoked under 28 U.S.C. §1330, 28 U.S.C. §1605(a), and 28 U.S.C. §1367, and the judgment was entered on April 28, 2003. The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked under two provisions for two appeals from the District Court's order -- the collateral order doctrine and the permissive appeal provision of 28 U.S.C. §1292(b). The Court of Appeals consolidated the two appeals, and the judgment was entered on April 28, 2003. The Court of Appeals denied Petitioners' timely petition for panel rehearing on June 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Civil Procedure 12(b)(3) and 12(b)(6) and 28 U.S.C. §§ 1404(a) and 1406(a).

IV. STATEMENT OF THE CASE

The District Court correctly denied Petrobras' motion to dismiss under Rule 12(b)(3) due to a forum selection clause in a contract that was not the subject of the litigation, and the Fifth Circuit's erred in overruling the District Court and dismissing the case for improper venue. The forum selection clause was contained in an initial confidentiality agreement between the Strata and Petrobras that limited its applicability to disputes arising under or related to the confidentiality agreement and whose survivability clause did not contain the forum selection clause. Strata sued Petrobras under two separate theories: breach of an oil and gas joint development agreement (entered into after the termination of the confidentiality agreement); and fraudulent representations made by Petrobras concerning the outright sale of properties to Strata (once again, made after the termination of the confidentiality agreement). The Court of Appeals used a de novo standard of review and broadly determined that the forum selection clause in the terminated confidentiality agreement mandated that all of Strata's claims had to be brought in Brazil in arbitration and that the District Court should have dismissed the suit under Rule 12(b)(3).

This case brings three important and related issues to this Court – 1) whether a forum selection clause in an expired agreement that did not its survivability can bar all of a party's claims that arose from agreements and conduct that entered into and occurring after the termination of the initial agreement; 2) whether the court of appeals' standard of

review is de novo on a forum selection clause issue; and 3) what the correct procedural vehicle is to raise a forum selection clause issue. Due to the importance of international commerce, these issues are of great importance to the public in general. Further, the courts of appeals have conflicting opinions on these issues. Accordingly, this Court should grant this Petition for Writ of Certiorari.

A. Statement Of Facts

At a conference in 1996, Petrobras solicited United States businesses to become partners with it in the development of oil and gas fields in Brazil. Due to these solicitations, Strata decided to enter into negotiations with Petrobras to jointly develop certain oil and gas fields. Strata and Petrobras entered into a Memo of Understanding ("MOU") on June 11, 1997, that governed issues of confidentiality so that Petrobras could disclose various projects available for joint development. The MOU was a preliminary agreement to provide Strata certain information in order for them to evaluate whether they wished to continue negotiations. The MOU contained a forum selection clause that stated that disputes arising out of or relating to "this MOU" would be settled by arbitration in Brazil. The MOU was neither ancillary to nor guaranteed or committed either party to any other agreement. The MOU was binding for a period of twelve (12) months. Neither Strata nor Petrobras extended the MOU, its survivability clause did not include the forum selection clause and it expired on June 11, 1998.

After reviewing the proposed projects, Strata selected two projects to do a technical review, and after Petrobras confirmed that they were available, the parties entered into an Agreement on Technical Assistance ("ATA") on August 4, 1997. The ATA provided that Strata would make

recommendations with respect to exploration of oil and gas prospects and/or enhancement of marginal fields. No agreement for joint activities had been entered into under the ATA.

The Heads of Agreement ("HOA") is a separate agreement from the MOU and the ATA. After years of negotiation, Petrobras and Strata agreed to all material terms of the HOA. Petrobras prepared the HOA, and it was executed by Strata on July 30, 1999. When Strata signed the HOA, Petrobras represented that the HOA would be signed by Petrobras when its signatory returned.

Later, however, Petrobras informed Strata that Petrobras would not sign the HOA and would have to back out of the HOA. In lieu of the HOA, Petrobras offered to sell up to seventeen oil and gas properties in Brazil to Strata on a preferred, no-bid basis. At a conference in Houston, Texas, one of Petrobras' directors affirmed that he had approved the sale of the properties to Strata on a private, exclusive basis, that the full Board would approve it, and that the sale was legal in Brazil.

Notwithstanding these representations, in March of 2000, Petrobras notified Strata that a private, preferred sale was illegal under the Brazilian law and that Petrobras would not agree to a preferred sale of the properties to Strata. Petrobras' representations were made with the intention of inducing Strata to forego insisting upon performance of the HOA because the sale was offered in lieu of the HOA. In other words, Petrobras refused to execute the HOA in breach of its promises and agreement to do so (which were actionable under Texas and Brazilian law), and Petrobras' representations in Houston were part of its efforts to divert

and misguide Strata into not seeking to enforce their rights under the HOA.

B. Proceedings Below

Strata filed the above styled suit on September 1, 2000, in the United States District Court for the Southern District of Texas, Houston Division, the Honorable John D. Rainey presiding. Strata filed suit against Petrobras based equally upon Texas common law causes of action and similar Brazilian causes of action against Petrobras. Petrobras moved to dismiss the suit because of 1) lack of subject matter jurisdiction due to foreign sovereign immunity; 2) lack of personal jurisdiction due to a "fair play and substantial justice" inquiry; 3) a forum selection clause contained in a preliminary confidentiality agreement (filed under Rule 12(b)(3)); and 4) forum non conveniens.

Judge Rainey referred Petrobras' motions to Nancy K. Johnson, a Magistrate Judge, who issued a Memorandum and Recommendation ("M&R") on January 21, 2002. In this M&R, Magistrate Johnson held that even though Petrobras was entitled to the status of a "foreign state" under the FSIA, maintenance of the suit was proper under the commercial activity exception. Magistrate Johnson also held that the District Court had personal jurisdiction over Petrobras due to general contacts and specific contacts and that the exercise of jurisdiction over Petrobras would not offend traditional notions of fair play and substantial justice. Lastly, Magistrate Johnson found that the suit should not be dismissed due to forum non conveniens or the forum selection clause.

On March 19, 2002, Judge Rainey adopted Magistrate Johnson's M&R. Petrobras filed a motion for rehearing, which Judge Rainey denied on March 27, 2002. Petrobras

filed a second motion for rehearing, which Judge Rainey denied on May 16, 2002. Petrobras filed its notice of appeal on May 24, 2002. Petrobras appealed the District Court's order on subject matter jurisdiction under the collateral order doctrine, and in a separate appeal, appealed the district court's personal jurisdiction, forum selection/arbitration clause, and forum non conveniens under a permissive appeal.

The Court of Appeals for the Fifth Circuit consolidated the two appeals. The Court of Appeals entered its judgment on April 28, 2003. The Court found that the District Court had subject matter jurisdiction and had personal jurisdiction over Petrobras, but held that the forum selection clause required dismissal of all of Strata's claims. Strata timely filed a motion for rehearing to the panel, which the Court of Appeals denied on June 6, 2003. Strata seeks review from this Court on the appropriateness of the dismissal of all of Strata's claims due to the forum selection clause.

V. REASONS FOR GRANTING THE WRIT

This Court has jurisdiction to review cases by writ of certiorari for two basic purposes: to decide questions of importance that are in the public interest to have decided by courts of last resort and to secure uniformity of decision between courts of appeals. *Magnum Import Co. v. Coty*, 161 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923). Both of these purposes exist in this case.

First, this case involves the important question of whether a forum selection clause in an expired contract between United States corporations and a foreign corporation applies in a dispute between the same parties over a subsequent and unrelated agreement and to fraudulent conduct that dealt with a separate transaction. Foreign commerce and business

relations have an obvious importance in today's economy. The United States is the economic leader in the world with countless international transactions occurring on a daily basis. Many of these transactions occur with forum selection provisions. Should one such transaction work to bar United States citizens from bringing suit in the United States on subsequent transactions that do not contain forum selection clauses? Courts have been expanding the applicability of forum selection clauses to cover more and more unrelated transactions by virtue of the boiler plate clause – "arising under or related to." Should the broad application of a forum selection clause be extended to apply where the clause at issue exists in a clause in an expired agreement, not the subject of the litigation. The importance of this issue is self evident. This Court should grant Strata's petition to address this issue if general importance to the public. *See Shapiro v. United States*, 235 U.S., 35 S.Ct. 122, 59 L.Ed. 291 (1914) (petition granted because of importance of issues).

Second, there is currently a split in the court of appeals regarding what the correct procedural device is to challenge a plaintiff's choice of forum due to a forum selection clause. Further, there is a split in the court of appeals regarding what the appropriate standard of review is over a district court's decision to enforce a forum selection clause. This Court has the duty to unify the courts of appeals and to set a clear course for such important issues – issues that often arise in district courts all over this great Nation. *See Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976) (Court grants petition where conflict in courts of appeals); *Commissioner v. Bilder*, 396 U.S. 499, 82 S.Ct. 881, 8 L.Ed.2d 65 (1962) (same).

A. THE COURT OF APPEAL'S DECISION IS OVERLY BROAD AND IMPACTS IMPRINT INTERNATIONAL COMMERCE REGARDING FORUM SELECTION CLAUSES

The MOU was a confidentiality agreement with respect to the information Petrobras provided to Strata in the initial stages of their negotiations for a joint venture of certain oil and gas properties situated in Brazil. The claims in this suit, however, do not arise out of or relate to the MOU. For a forum selection clause in an agreement to apply in a case, the case must be related to the contract containing the clause. *See Magellan Real Estate Inv. Trust v. Losch*, 109 F.Supp.2d 1144, 1159 (D. Ariz. 2000); *Jacobson v. Mailboxes Etc.* 646 N.E.2d 741, 745 (Mass. 1995); *Crowson v. Sealaska Corp.*, 705 P.2d 905, 910 (Alaska 1985).

It is unreasonable to enforce a forum selection clause in the MOU with respect to claims arising from or related to a subsequent contract, the HOA, under the circumstances of this case. Normal rules of contract construction prevail in interpreting arbitration/forum selection clauses – if the parties do not intend that the provision should apply, then it does not apply. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Where the parties' intent, as evidenced by their agreements, is that a forum selection clause should not survive an initial agreement, that forum selection clause provision should not govern a suit on a subsequent agreement. The Court of Appeals' decision to the contrary is opposite an earlier opinion from the same Court. *See Oil Chemical & Atomic Workers Int'l Union Local No. 4-23 v. American Petro. Co. of Texas*, 820 F.2d 747 n.3 (5th Cir. 1987) (court affirmed portion of the district court's opinion holding that an arbitration clause in an expired contract did not apply to claims that arose after that contract had terminated.).

Strata has two separate types of claims: 1) based upon the breach of HOA, and 2) based upon Petrobras' fraudulent conduct. The express terms of the contracts in this case show that the forum selection clause in the MOU did not survive its term and did not relate to the MOU or Strata's fraud claims.

1. HOA CLAIMS ARE NOT RELATED TO THE MOU

The forum selection clause in the MOU specifically states that it relates to the MOU – a bolded term in the agreement – a contract that dealt solely with the exchange of information and confidentiality. There was not a single claim raised by Strata in this suit that related to the parties' obligations or responsibilities under the MOU – Strata raised no confidentiality claims.

The intent of the Parties was that the arbitration clause would not survive the term of the MOU, which expired on June 11, 1998. In fact, the MOU contained a survivability clause that only extended the confidentiality provisions for a two year period after termination. As the MOU did not include the forum selection clause within its survivability clause, the Parties' intent as evidenced by the agreement itself is that forum selection clause did not survive the agreement. Moreover, the MOU contained a disclaimer that indicated that the MOU was expressly not related to future agreements.

Strata's claims in this suit arose solely after the termination of the MOU. The HOA did not contain a forum selection clause and it does not incorporate either the MOU or the ATA. Further, as Petrobras testified that it ordinarily placed a forum selection clause into HOA agreements, it should be assumed that it was intentionally left out. Strata's breach of the HOA claims were not subject to the forum

selection clause in the MOU, and the Court of Appeals' opinion sets dangerous precedent in this important area of international commerce.

2. FRAUD CLAIMS ARE NOT RELATED TO MOU.

Strata's fraud claims are factually distinguishable from its HOA claims. Its fraud claims arise from Petrobras' misrepresentations concerning Strata's ability to acquire up to 17 properties on a preferential purchase basis. The 17 properties that Petrobras promised to Strata when it refused to sign the HOA were never made part of nor incorporated into any MOU or ATA. These properties were not a part of the joint venture or partnership contemplated in the MOU, ATA, and HOA. The Court of Appeals did not discuss any rationale or reasoning as to why the forum selection clause would apply to the fraud claims in connection with this other remote transaction. Accordingly, even if Strata's claims under the HOA should be sent to Brazil, Strata should still be able to pursue its fraud claims in Texas.

3. DANGEROUS RESULT OF COURT OF APPEALS DECISION

The Court of Appeals' decision is overly broad and dangerous. Take the following example for instance. A United States corporation purchases a business via financing from foreign banks and enters into a note that has a forum selection clause. The purchaser pays off the note, and it is released. Later, the purchaser goes to the same bank and obtains additional financing using the same property as collateral – but the new note has no forum selection clause. If the parties have a dispute over the second note, does that mean that the forum selection clause of the first note applies?

Under this Court of Appeals' opinion in this case, the answer is yes. Accordingly, this Court should grant Strata's Petition for Writ of Certiorari to set this important aspect of international commerce right.

B. FORUM SELECTION CLAUSE NOT PROPERLY RAISED BY RULE 12(b)(3) MOTION

Strata properly alleged venue in the district court pursuant to 28 U.S.C. 1391(d). Petrobras raised the forum selection clause issue to the district court via a Rule 12(b)(3) improper venue motion. However, venue was correct in the district court – Petrobras attempted to enforce a contractual provision that limited the forum of the Parties' disputes. There is presently a conflict in the courts of appeals concerning whether the contractual validity of a forum selection clause is a matter of venue, and whether a motion to dismiss for improper venue under Rule 12(b)(3) is a proper vehicle to raise a forum selection clause issue. *See Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 535-36 (6th Cir. 2002)(12(b)(3) is not appropriate); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1289-1290 (11th Cir. 1998) (12(b)(3) is appropriate); *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite*, 867 F.2d 697, 699-700 (D.C. Cir. 1989) (implies 12(b)(3) is appropriate); *International Software Systems, Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114 (5th Cir. 1996) (implies that 12(b)(3) is appropriate). In fact, this Court's prior precedent has not been entirely clear as to the proper procedural vehicle to raise such an issue. *Compare Stewart Organization v. Ricoh Coys.*, 487 U.S. 22, 28, 108 S.Ct. 2239, 101 L.Ed. 2d 22 (1988) (states that motion to transfer under §1404(a) is appropriate); *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594, 111 S.Ct. 1522, 113 L.Ed. 2d 622 (1991) (implied that motion to dismiss under §1406(a) can be appropriate); *see also, Haskel*

v. FPR Registry, Inc., 862 F.Supp. 909, 913 (E.D.N.Y. 1994); Taylor, *The Forum Selection Clause: a Tale of Two Concepts*, 66 TEMPLE L. REV. 785, 843-45 (1993); Borchers, *Forum Selection Agreements In the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L.REV. 55, 74 (1992).

A Rule 12(B)(3) motion is not appropriate where venue is proper but there is a forum selection clause that mandates forum elsewhere. As the *Kerobo* Court stated:

> We think that this fact argues persuasively for the view that whether a forum-selection clause should be enforced is a matter of contract, not an issue of proper venue. . . . [T]he Supreme Court made it clear in *Recoh* that forum selection clauses do not dictate the forum. Indeed, the Court footnoted with apparent approval the parties' agreement that the district court had properly denied the motion to dismiss for improper venue because the case had been filed in the venue proscribed by 28 U.S.C. §1391 . . . We think that this is a clear signal that if venue is proper under the statute, a motion to transfer for improper venue will not lie. . . .We therefore hold that the district court erred in granting the defendants' motion to dismiss for improper venue. *Kerobo v. Southwestern Clean Fuels, Corp.*, at 535-36.

As Petrobras raised the forum selection clause issue in a Rule 12(b)(3) motion to dismiss for improper venue, the district court did not err in denying that motion. That issue should have been raised in either a Rule 12(b)(6) motion or a motion for summary judgment. *See e.g., Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387-88 (1st Cir. 2001) (Rule 12(b)(6) is appropriate); *Instrumentation Associates, Inc. v.*

Madsen Electronics (Canada), Ltd., 859 F.2d 4, 6 (3rd Cir. 1988) (Rule 12(b)(6) motion appropriate); *Rogen v. Memry Corp.*, 886 F.Supp. 393, 395 (S.D.N.Y. 1995) (granting summary judgment due to forum selection clause). As there are conflicting decisions from the courts of appeals on this issue, and it is an issue that is frequently addressed, this Court should grant Strata's Petition for Writ of Certiorari.

C. THE PROPER STANDARD OF REVIEW OVER FORUM SELECTION ISSUES SHOULD BE ABUSE OF DISCRETION

Finally, there also a conflict in the courts of appeals regarding the correct standard of review over a district court's determination on a forum selection clause objection. The Fifth, Sixth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals review determinations regarding the enforceability of forum selection clauses *de novo*. *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995); *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992). However, the Ninth and Eighth Circuits review those decisions under an abuse of discretion standard. *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 n.8 (8th Cir. 1986). This case is a good example of how the differing standards may effect the outcome.

The main issue is whether the forum selection clause in the MOU was intended by the parties to control all future agreements or actions between them. The only evidence that the three agreements were related is conclusory statements made by Petrobras in its brief on appeal. The district court

found that the Parties did not intend for the forum selection clause in the MOU to apply to the HOA or to Strata's fraud claims. This was a fact intensive determination. When the three agreements are read in totem with an understanding of their purposes and the properties that they were based upon – the only reasonable conclusion supports the district court's conclusion. However, the Court of Appeals reviewed the district court's determination under a de novo standard, ignored the contracts and facts, and reversed the district court's determination.

This standard of review is inconsistent with the procedural method that Petrobras raised the forum selection clause – Rule 12(b)(3) motion. Generally, the standard of review over a Rule 12(b)(3) motion is an abuse of discretion. *See Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 445 (7th Cir. 1993). The procedure that is utilized in raising the forum selection clause issue necessarily impacts the standard of review.

As the District Court's determination necessarily involved the facts of this case and as the issue was raised under a Rule 12(b)(3) motion, the Court of Appeals should have used an abuse of discretion standard of review. This Court should respectfully grant Strata's Petition for Writ of Certiorari, reconcile the courts of appeals conflict on this issue, find that under the facts of this case, the appropriate standard of review is an abuse of discretion, and affirm the district court's order denying Petrobras' 12(b)(3) motion.

VI. CONCLUSION

Strata requests that this Honorable Court grant this petition for a writ of certiorari because this case presents important questions of international trade and commerce and

because there is currently conflict between the courts of appeals regarding the proper procedural device to raise a forum selection clause issue and the appropriate standard of review over the determination of that issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-20645
consolidated with Case No. 02-20767

[Filed June 6, 2003]

STRATA HEIGHTS INTERNATIONAL CORPORATION; STRATA ENERGY RESOURCES CORPORATION; HEIGHTS ENERGY CORPORATION	)
Plaintiffs - Appellees	)
v.	)
PETROLEO BRASILEIRO SA, also known as Petrobras Brasileiro	)
Defendant - Appellant	)

Appeals from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges:

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT :

/s/ _____
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 02-20645 & 02-20767

[Filed April, 2003]

STRATA HEIGHTS INTERNATIONAL CORPORATION; STRATA ENERGY RESOURCES CORPORATION; HEIGHTS ENERGY CORPORATION,	)
Plaintiffs - Appellees,	)
versus	)
PETROLEO BRASILEIRO, SA, also known as Petrobras Brasileiro,	)
Defendant - Appellant.	)

Appeal from the United States District Court
for the Southern Distriot of Texas
(USDC No. H-00-CV-3052)

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges.

REAVLEY, Circuit Judge:*

OPINION

Strata Heights International Corp., Strata Energy Resources, and Heights Energy Corp. (collectively "Strata") sued Petróleo Brasilerio, S.A. ("Petrobras"), the national oil company of Brazil, for breach of contract, promissory estoppel, quantum meruit, and fraud and misrepresentation under Texas law and similar actions under Brazilian law. The district court denied Petrobras's motions to dismiss under the Foreign Sovereign Immunities Act ("FSIA"),[1] for lack of personal jurisdiction, to enforce a forum selection clause, and for forum non conveniens. Petrobras appealed the district court's denial of its FSIA motion to dismiss under the collateral order doctrine.[2] The district court denied Petrobras's remaining motions to dismiss but certified an interlocutory appeal. This court agreed to hear the interlocutory appeal and consolidated it with Petrobras's FSIA appeal.

Petrobras is not entitled to foreign sovereign immunity, and the exercise of personal jurisdiction over the company comports with traditional notions of fair play and substantial justice. We do not reach the district court's decision to deny

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 28 U.S.C. § 1601 *et seq.*

[2] *See Arriba, Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532 (5th Cir. 1992).

the motion to dismiss for forum non conveniens because we hold that the district court erred by refusing to enforce the forum selection clause. Accordingly, we vacate and remand to the district court and order that the suit be dismissed.

Background

In the mid-1990s, the Brazilian government decided to allow foreign companies to bid to explore oil in Brazil. Petrobras solicited U.S. businesses to become joint venture partners.

Pursuant to this solicitation, Strata signed a Memorandum of Understanding ("MOU") containing confidentiality provisions regarding potential opportunities for joint ventures between Petrobras and private companies. Under the MOU, Petrobras disclosed various projects available for joint development with assurances that the disclosures would be kept confidential. The MOU provided that all disputes arising out of or relating to the MOU be resolved through Brazilian arbitration. The MOU expired one year after it was signed unless extended by the parties, except that the contract's confidentiality provisions expired after two years. Neither Petrobras nor Strata extended the MOU, and it expired on June 11, 1998.

After reviewing the proposed projects, Strata selected two (BES-1 and BSF-1) on which to perform a technical review. After Petrobras confirmed the projects were available, Strata signed an Agreement for Technical Assessment ("ATA"). The ATA provided that Strata wotfld pay Petrobras $20,000 to purchase technical information to assist their evaluation of the projects they were to bid upon. Strata would then submit

a report to Petrobras evaluating those properties. The ATA was an addendum to the MOU and adopted its terms.

After Petrobras informed Strata that its ATA proposals were accepted, Strata learned that Petrobras had surrendered the BES-1 project to the Brazilian regulatory agency, Agencia National de Petrolio ("ANP"). Strata requested additional producing properties to replace the loss of BES-1 ("the rejuvenation projects").

Because both the MOU and the ATA were preliminary agreements, the parties were required to negotiate another agreement: the Technical Assistance Contract ("TAC"). The TAC was a production-sharing agreement comprised of the Heads of Agreement ("HOA"), an Operating Agreement, and other documents. The HOA provided that Strata and Petrobras would enter into a joint development agreement for the enhancement of BSF-1 and the rejuvenation projects.

According to the allegations of Strata's complaint, Petrobras prepared the HOA and Strata signed it after Petrobras's representative told Strata that Petrobras had agreed to the terms of the contract and would sign it as soon as its signatory officer was available.

Strata further alleges that Petrobras then informed Strata that Petrobras had surrendered BSF-1 to the ANP and that it would not execute the HOA because it now chose to sell the rejuvenation projects outright. Petrobras told Strata it would offer to sell up to seventeen oil and gas properties in Brazil to Strata on a preferred, no-bid basis. This essentially gave Strata a right of first refusal with regard to these seventeen properties in exchange for Strata giving up whatever rights it

had under the HOA. Strata contends this offer was repeated by Petrobras's directors and officers on several occasions, who assured Strata that the offer was approved by Petrobras's Governing Board.

At an unrelated conference in Houston in 1999, Ray Diaz, Managing Director of Strata Heights and President of Strata Energy, sought personal assurances from Jose Coutinho Barbosa ("Barbosa"), head of the Exploration and Production Division of Petrobras, regarding the preferred sale. According to Strata, during a break at the conference, Diaz spoke to Barbosa, who recognized Strata and stated that he was familiar with their past and pending transactions with Petrobras. Barbosa affirmed that he had approved the preferred sale of the properties to Strata, and that anything he approves is always approved bythe Governing Board of Petrobras. Diaz asked Barbosa whether the sale was valid under Brazilian law, and Barbosa assured Diaz it was. He stated that Petrobras's legal department had concluded the sale was legal and would hold up in court if challenged. He added that the legal department would so advise the Board when the matter came up for approval. After this meeting, Strata requested that Petrobras provide written confirmation of the preferred sale offer. Petrobras sent Strata an unsigned confirmation letter but never forwarded a signed version.

In March 2000, Petrobras notified Strata that the private, preferred sale was prohibited under Brazilian law, and that Petrobras was required to surrender the rejuvenation projects to the ANP for open bidding. Strata sent Petrobras a letter proposing that the rejuvenation projects be excluded from the public bidding, but Petrobras did not respond. Strata did not submit a bid during the open bidding. This suit followed.

Foreign Sovereign Immunity

We review determinations of foreign sovereign immunity under the FSIA de novo.[3] The FSIA sets forth the sole and exclusive standards to be used to resolve all sovereign immunity issues raised in federal and state court by foreign sovereigns or their instrumentalities.[4] A foreign sovereign is not entitled to immunity from suit if its conduct fails within an exception to the FSIA. Once such exception, known as the commercial activity exception, provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> ...
>
> > (2) in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or upon [2] an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon [3] an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[5]

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[3] *Pere ex rel. Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998).

[4] *Arriba*, 962 F.2d at 532.

[5] 28 U.S.C. § 1605(a)(2).

The district court determined that Strata's fraud claims fell within the second clause, and that its contract claims fell within the third clause of the commercial activity exception.

Petrobras complains that the conversation in Houston between Diaz and Barbosa was "plainly commercial in nature" because the conversation concerned business opportunities in Brazil, and thus Strata should have proceeded under the first clause with respect to its fraud claims. Although this court has previously determined that the second clause applies only to claims based upon conduct that is not commercial,[6] we find Petrobras's argument unconvincing. Even if fraud-and-misrepresentation are commercial, as opposed to noncommercial, acts, the commercial activity exception applies in this particular case.[7] Despite the district

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[6] *See Byrd v. Corporacion Forestal y Indust. de Olancho, S.A.*, 182 F.3d 380, 390 (5th Cir. 1999); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998).

[7] Although we are bound by the decisions in *Voest-Alpine* and *Byrd*, we note that in the House of Representatives Report on the FSIA Congress stated:

> Although some or all of [the acts covered by the second clause] might also be considered to be a 'commercial activity carried on in the United States,' as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the

court's refusal to consider the applicability of the first clause, it is well settled that this court will not reverse a district court if it can be affirmed on any ground supported by the record, regardless of whether that ground was considered by the lower court.[8] Strata's fraud claims are based upon either a commercial act performed within the United States or upon a noncommercial act performed within the United States in connection with commercial activity abroad. Accordingly, the district court had jurisdiction to consider Strata's fraud claims against Petrobras, regardless of whether that jurisdiction was

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basis of a cause of action.

H.R. PEP. No. 1487, 94th Cong., 2d Sess., at 19(1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. Thus, the *Voest-Alpine* court, seizing on the Supreme Court's distinction between sovereign and commercial acts in *Saudia Arabia v. Nelson*, 507 U.S. 349 (1993), may have read a distinction into the statute that neither Congress nor the Supreme Court intended. *See id.* at 358-61.

In *Nelson*, the Supreme Court noted that "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity," but concluded only that the first clause "calls for something more than a mere connection with, or relation to commercial activity." *Id.* at 358. The Court did not conclude that the second clause cannot apply in cases in which a suit is based upon a commercial act in the United States performed in connection with commercial activity abroad; it focused instead on the relationship between public and private acts with respect to the first clause. *See id.* at 358 n.4, 359-63.

[8] *See, e.g., United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765 n.6 (5th Cir. 1996).

created by the first or the second clause of the commercial activity exception. Petrobras's remaining arguments regarding the district court's application of the second clause to Strata's fraud claims are meritless.

Petrobras also argues that the district court erred by applying the third clause of the commercial activity exception, which requires an action be based upon commercial activity abroad that has a direct effect on the United States, to Strata's contract claims. Recognizing that "a nontrivial effect in the United States need only be an immediate consequence of the foreign state's activity to support jurisdiction under the third clause,"[9] Petrobras contends that Strata's losses were not an immediate consequence of Petrobras's activity, and, even if they were, this court should recommend en banc reconsideration of *Voest-Alpine*.

We decline to follow Petrobras's suggestion. Strata's complaint sufficiently alleges contract losses, in the form of reliance, expectancy, and restitution damages, that occurred as an immediate consequence of Petrobras's commercial activity in Brazil. In particular, Strata complains that Petrobras represented that it had agreed to abide by the terms of the HOA when it had not, that Strata relied on Petrobras's representations and spent considerable sums and suffered opportunity costs as a result of that reliance, and that Strata performed valuable services which benefitted Petrobras and for which it has not been justly compensated.

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[9] *Voest-Alpine*, 142 F.3d at 896.

Strata has alleged that Petrobras targeted American corporations as joint venture partners, actively solicited their participation, and then requested that they perform extensive evaluations of Brazilian properties knowing those evaluations would be done with American resources. It was not merely fortuitous that the plaintiffs were American companies; it was part of Petrobras's business plan.[10] Accordingly, we conclude that Petrobras's representations of its intent to enter the HOA and its acceptance of the ATA reports is conduct upon which Strata's claims are based and that some undetermined but nontrivial amount of Strata's losses followed as an immediate consequence of such conduct.

We are mindful of the dangers of expanding the third clause of the commercial activity exception to include too much. We are also mindful, however, of the Supreme Court's admonishment that we not read limitations into this clause that are not expressed in the statute.[11] The requirement that a direct effect under the third clause be nontrivial sufficiently limits the scope of foreign sovereign immunity, for it precludes a few phone calls or letters from the United States from constituting a direct effect.[12] We need not determine here when an effect is so small as to be trivial, as in this case Strata allegedly spent thousands of dollars, as a result of

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[10] *Cf. Byrd*, 182 F.3d at 391 (concluding that where the "appellants foresaw...the financial harms which occurred to appellees," the third clause abrogated sovereign immunity).

[11] *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

[12] *Cf. Voest-Alpine*, 142 F.3d at 896; *Byrd*, 182 F.3d at 390.

representations made by Petrobras, pursuing a contract that Petrobras ultimately breached. The district court properly applied the third clause of the commercial activity exception to the FSIA to Strata's claims to determine that Petrobras was not entitled to foreign sovereign immunity.

Personal Jurisdiction

We review determinations of personal jurisdiction de novo if the facts upon which jurisdiction is based are not in dispute.[13] Petrobras contends the district court erred because, while it concedes minimum contacts with the United States and Texas, the exercise of personal jurisdiction by Texas courts over Petrobras does not comport with fair play and substantial justice.

Once a plaintiff has established minimum contacts, the burden shifts to the defendant to establish that the exercise ofjurisdiotion is unfair.[14] Petrobras has not met its burden in that regard. As the district court determined, Petrobras's actions "demonstrate[d] its intent to benefit from this nation's legal and commercial climate." Given Petrobras's targeting and soliciting of American joint venture partners in Texas and California, Petrobras will not be unfairly burdened by litigation in Texas. Although Petrobras endeavored to avoid litigation in the United States, their efforts reveal that the present action, or one like it, was foreseeable. In light of

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[13] *See Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 667 (5th Cir. 2000).

[14] *See Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999).

these circumstances, the burden on Petrobras is no greater than Strata's interest in convenient and effective relief.

Moreover, Texas has an interest in resolving Strata's claims. When a party commits a tort in Texas, it is not unfair or substantially unjust to make it answer for that tort in Texas.[15] Although Brazil has a strong interest in a dispute involving its national oil company, that alone cannot render the exercise of jurisdiction unfair else courts would never be able to exercise personal jurisdiction over foreign sovereigns. Thus, the exercise of personal jurisdiction over Petrobras by Texas courts comports with traditional notions of fair play and substantial justice.

Forum Selection Clause

Petrobras also contends that the district court erred by declining to enforce the forum selection clause contained in the MOU. We review determinations of the enforceablity or scope of forum selection clauses de novo.[16] The district court determined that Strata's claims did not arise under the MOU, and thus declined to dismiss the suit. The forum selection clause, however, also applies to claims related to the MOU:

> Any dispute, controversy or claim arising out of or relating to this MOU or the breach, termination, or

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[15] *See, e.g., Central Freight Lines, Inc. v. APA Transp. Corp.*, 322 F.3d 376, 383-84 (5th Cir. 2003); *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 628-30 (5th Cir. 1999).

[16] *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002).

> invalidity hereof, which cannot be settled amicably between the Parties shall be settled by arbitration to be conducted in Rio de Janeiro in the Portuguese language, in accordance with the rules of the United Nations Commission on international trade law (emphasis added).

Thus, if Strata's causes of action relate to the MOU or the ATA, we must reverse the district court and order that it dismiss Strata's suit on remand. We do not resolve whether the claims arise out of the MOU or ATA because we find the claims relate to those agreements.

Courts must presumptively enforce forum selection clauses in international transactions out of concern for comity and to promote international trade and commerce.[17] "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[18]

Because arbitration is a matter of contract, courts may require a party to submit a dispute to arbitration only if the party has expressly agreed to do so.[19] Strata concedes that the

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[17] *See Haynsworth v. Corporation*, 121 F.3d 956, 962 (5th Cir. 1997) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

[18] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

[19] *Personal Security & Safety Sys., Inc. v. Motorola, Inc.*, 297 F.3d 388, 392 (5th Cir. 2002).

MOU's foreign arbitration clause is binding with respect to disputes arising under or relating to the MOU, but argues that its claims do not relate to the MOU or ATA and thus does not fall within the scope of the clause.

We generally "resolve doubts concerning the scope of coverage of an arbitration clause in favor of arbitration."[20] The clause requiring arbitration in Brazil is undoubtedly a "broad" arbitration clause that "embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute."[21] "[W]here the parties include a broad arbitration provision in an agreement that is 'essential' to the overall transaction, we will presume that they intended the clause to reach all aspects of the transaction.[22] Accordingly, it is only necessary that Strata's claims "'*touch*' matters covered by [the MOU or ATA] to be arbitrable."[23]

To determine whether Strata's claims fall-within the scope of the forum selection clause, we must explore the relationships between the agreements at issue. The MOU noted that Petrobras would be allowed to keep an undefined

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[20] *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990).

[21] *Pennzoil Exploration & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998).

[22] *Personal Security*, 297 F.3d at 395.

[23] *Pennzoil*, 139 F.3d at 1068 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S 614, 625 n.14 (1985)).

number of areas for exploration and exploitation because Brazilian oil and gas law was in a period of transition. Petrobras agreed to disclose general information on these possible joint ventures, and Strata agreed to maintain certain confidentiality measures with regard to that information. Although the MOU did not bind the parties to proceed to the ATA, the contract provided that "Petrobras shall keep contacts with Strata aiming at the execution of an [ATA]."

The ATA, in ram, provided that Petrobras would release more detailed data regarding certain properties selected by Strata under the MOU and Strata would prepare a report on its technical and economical assessment of each such property. The ATA "serve[d] the purpose of an addendum to the MOU," because the MOU's confidentiality provisions applied equally to the information Petrobras disclosed pursuant to the ATA. Although the ATA was not intended to give the parties rights or to act as an offer by Petrobras to proceed to the execution of joint development agreements, the ATA provided that "[i]f Strata has decided to [proceed] further in the negotiations with Petrobras,... the parties shall discuss a timetable for negotiation of the economical, legal, and operational terms of the [joint venture agreements] within a reasonable time."

One such joint venture agreement, the HOA, defined the fights and obligations of the parties with respect to operations under a yet-to-be negotiated Operating Agreement. Strata agreed to make certain minimum capital expenditures and to carry out its Minimum Work Program set forth in its ATA report. Petrobras agreed to accept 100% of Strata's production under the Operating Agreement and to pay Strata in the form of a Production Reward. The HOA provided that

it was not a binding agreement" and that the parties could withdraw "for any reason without any claim against any other party." However, the HOA also provided that the parties "shall meet to negotiate the Operating Agreement."

We think the MOU, ATA, and H0A are sufficiently interrelated to require us to apply the MOU's forum selection clause to each of Strata's causes of action. As in *Pennzoil*, "[t]he dispute flows from a series of interrelated agreements, all of which center around the overriding goal of acquiring [oil and gas] development rights [in Brazil]."[24] Additionally, the terms of the agreements demonstrate their interrelationship; each contract contemplates that the parties will negotiate future contracts. Although the agreements at issue here were not executed contemporaneously, each was aimed at creating a joint venture to explore oil and gas properties in Brazil and each was an essential part of the transaction. The HOA binds Strata to perform the Minimum Work Program set forth in its ATA proposal, and the ATA expressly incorporates the terms of the MOU. Accordingly, Strata's claims that Petrobras wrongly prevented it from enforcing its fights under the HOA, through fraud or through breach of contract, relate to the MOU and ATA.

In the alternative, Strata argues that even if its claims under the HOA relate to the MOU and ATA, the ATA incorporated the 12-month term provision of the MOU, and thus both the MOU and the ATA expired prior to the alleged breaches and misrepresentations identified in Strata's complaint. Strata notes that the MOU contains a survivability

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[24] 139 F.3d at 1068.

clause for the confidentiality provisions, extending the term of the contract with respect to those provisions to two years. Thus, Strata contends that this court should refuse to enforce the forum selection clause on the ground that it has expired by applying the principle that to express one thing is to exclude others.[25]

This circuit has not addressed the precise question of whether dispute resolution provisions within a contract survive the termination or expiration of that contract. Absent an expression of contrary intent, broad arbitration clauses—if they are to mean what they say—must survive the expiration of the contract because such clauses are intended to reach all aspects of the parties' relationship, including post-contractual disputes.[26] Courts must enforce arbitration clauses unless it can be said "with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute[s] at issue."[27] When a clause purports to cover all disputes relating to the contract, that clause covers all disputes relating to the contract regardless of when that dispute arises. Were we to hold otherwise, we would be reading a temporal

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[25] Strata would have a better argument if the survivability clause were contained in the term provisions of the MOU. The survivability clause, however, is contained within the confidentiality provisions of the contract. Thus, it is not surprising that the clause addresses the survivability of the confidentiality provisions and not the dispute resolution provisions.

[26] *See Personal Security*, 297 F.3d at 394.

[27] *See Neal*, 918 F.2d at 37 (citations and quotation marks omitted).

requirement into the clause that its plain language cannot support.

Strata urges us to remand to allow it to conduct additional discovery and asks this court to disregard evidence filed with Petrobras's objections to the magistrate's Memorandum and Recommendation. Strata complains that Petrobras did not obtain any leave of court to file new evidence pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) when it filed its objections. Even if those provisions somehow limited Petrobras's right to offer new evidence or the district court's discretion to consider it, none of the evidence offered by Petrobras is relevant to our interpretation of the forum selection clause. Similarly, as the outcome of this appeal depends entirely on the interpretation of unambiguous contract language, granting Strata additional discovery would not inform the construction of the forum selection clause and is therefore unnecessary.

As the forum selection clause obliges us to order that the case be remanded and dismissed, we do not address whether the district court erred by declining to dismiss for forum non conveniens.

Conclusion

Petrobras is not entitled to foreign sovereign immunity because Strata's claims fall within the commercial activity exception to foreign sovereign immunity expressed in 28 U.S.C. § 1605(a)(2). Strata's fraud and misrepresentation claims are based either upon a commercial act in the United States or a noncommercial act in the United States, and thus

fall within either the first or second clause of the commercial activity exception. We do not decide whether fraud and similar business torts are commercial or noncommercial acts. We note, however, that under this court's current construction of the second clause of § 1605(a)(2), which requires a suit to be based upon noncommercial activity, the clause has little if any content, particularly if tortious activities driven by a profit motive are considered commercial.[28]

Nor is Petrobras entitled to immunity from Strata's contract claims. Strata allegedly suffered nontdvial losses in the United States as an immediate consequence of Petrobras's breaches of contract in Brazil. Petrobras' s argument that it is immune from suit hinges on its characterization of Strata's damages as unilateral expenditures. Nothing in the statute, however, precludes application of the third clause to losses in the form of expended capital.[29] In such cases, so long as the expenditures are nontrivial and their loss is an immediate consequence of the foreign sovereign's conduct, sovereign immunity is abrogated by the third clause of the commercial activity exception. Additionally, the district court's exercise of personal jurisdiction over Petrobras comports with traditional notions of fair play and substantial justice.

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[28] The Supreme Court has stated that the existence of a profit motive should not determine whether conduct is commercial, because the FSIA requires courts to look to the nature and not the purpose of the conduct. *See Weltover*, 504 U.S. at 614.

[29] Accordingly, Petrobras's attempts to distinguish *Voest-Alpine* on the ground that Petrobras did not fail to fulfill an obligation to pay Strata are unpersuasive.

The district court erred, however, by failing to enforce the broad forum selection clause contained in the MOU requiring all disputed related to that document to be arbitrated in Brazil. In light of the interrelationship of the MOU, ATA, and HOA, we cannot say that Strata's claims under the HOA do not relate to the MOU or ATA. Accordingly, we vacate the order of the district court and remand the case with orders that the cause be dismissed.

VACATED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-3052

[Filed March 20, 2002]

STRATA HEIGHTS INTERNATIONAL CORPORATION; STRATA ENERGY RESOURCES CORPORATION; HEIGHTS ENERGY CORPORATION	)
Plaintiffs,	)
v.	)
PETROLEO BRASILEIRO S.A.- Petrobras,	)
Defendant.	)

ORDER

Before the Court is Magistrate Judge Nancy K. Johnson's Memorandum and Recommendation entered January 21, 2002 (Dkt. #34). Timely objections to the M&R were filed by Defendant Petroleo Brasileiro S.A. - Petrobras (Dkt. #35). After considering the M&R, the objections, the entire record, and the applicable law, the Court ADOPTS the M&R.

Signed this 19th day of March, 2002.

/s/ _____
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-3052

[Filed March 28, 2002]

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION, and HEIGHTS ENERGY CORPORATION	)
Plaintiffs,	)
v.	)
PETROLEO BRASILEIRO S.A.- Petrobras,	)
Defendant.	)

ORDER

Pending before the Court is Defendant Petroleo Brasileiro S.A. - Petrobras's ("Petrobras") Motion for Oral Hearing, Motion to Reconsider, and Motion for Certification for Interlocutory Appeal (Dkt. #42). On March 20, 2002 the Court issued an order adopting Magistrate Judge Nancy K. Johnson's Memorandum & Recommendation ("M&R") denying Petrobras's motions to dismiss this case on Foreign Sovereign Immunities Act ("FSIA"), lack of personal jurisdiction, improper venue, and forum non conveniens grounds. Although the Court agrees with Petrobras that this case presents a number of close legal issues, the Court

believes that Judge Johnson's excellent M&R is correct. Therefore, Petrobras's Motion to Reconsider is DENIED.

The Court will hold a telephone conference to address the other issues raised in the pending motion on April 3, 2002 at 5:30 P.M.

It is so ORDERED.

Signed this 27th day of March, 2002.

/s/ _____
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-3052

[Filed May 16, 2002]

STRATA HEIGHTS INTERNATIONAL CORPORATION; STRATA ENERGY RESOURCES CORPORATION; and HEIGHTS ENERGY CORPORATION,	)
Plaintiffs,	)
v.	)
PETROLEO BRASILEIRO S.A.- Petrobras,	)
Defendant.	)

ORDER

Pending before the Court is Defendant Petroleo Brasileiro S.A.- Petrobras's ("Petrobras") Second Motion to Reconsider (Dkt. #45). After considering the parties' arguments and the applicable law, the Court is of the opinion that the pending motion should be denied. On March 20, 2002 the Court issued an order adopting Magistrate Judge Nancy K. Johnson's Memorandum & Recommendation ("M&R") denying Petrobras's motions to dismiss this case on Foreign Sovereign Immunities Act ("FSIA"), lack of personal jurisdiction, improper venue, and forum non conveniens grounds. On March 27, 2002 the Court issued an order

denying Petrobras's first motion to reconsider the order adopting the M&R. In its second motion to reconsider, Petrobras argues that a review of the evidence it submitted with its objections to the M&R warrants dismissal of Strata Heights International Corporation et al.'s (collectively "Strata Heights") claims. The Court has once again carefully reviewed the evidence submitted by both parties but must still concur with Judge Johnson's M&R.

In support of its forum non conveniens argument Petrobras relies on the affidavit of Rui Berford Dias which indicates that many important witnesses and numerous documents relevant to this case are located in Brazil. Some of these witnesses may not be subject to compulsory process in the United States[1] and many of the documents are in Portugese and will need to be translated if this case is to be tried in the United States. Petrobras also argues that it will have to obtain experts on Brazilian law to sustain its defense to SHIC's claims. While these claims may be true, these facts do not warrant a dismissal of this case on forum non conveniens grounds. Strata Heights has made assertions that mirror those of Petrobras. Many of the witnesses in this case live and work in the United States. Many vital documents are located in the United States and are written in English. Finally, Strata Heights has asserted as many claims under American law as

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[1] The Court notes, however, that several of these witnesses are Brazilian government officials. Because Petrobras is itself an arm of the Brazilian government, these witnesses are presumably sympathetic to Petrobras's cause and would seem to have every reason to assist Petrobras in its defense. It is unclear why these witnesses would be unwilling to voluntarily appear in an American court.

it has under Brazilian law. Only in rare circumstances should a case be dismissed on forum non eonveniens grounds simply to shift the burden and inconvenience of litigating in a foreign forum from the defendant to the plaintiff. Petrobras has failed to overcome the heavy presumption favoring a domestic plaintiffs choice of forum. *See Piper Aircraft v. Reyno,* 454 U.S. 235, 255 (1981).

Petrobras also argues that the Dias's affidavit supports its contention that if Petrobras and Strata Heights had entered into a final agreement, Petrobras would have insisted on a Brazilian forum selection clause. While it is true that courts will vigorously enforce forum selection clauses in international transactions, *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997), courts do not enforce hypothetical agreements or conjecture as to the terms of bargains that were never made.

Finally, Petrobras argues that it is entitled to FSIA immunity on Strata Heights's fraud claim because in his affidavit Jose Coutinho Barbosa, a Petrobras employee, denies making the fraudulent statements attributed to him by Raymond A. Diaz, the managing director of Strata Heights International Coiporation. In its response to Petrobras's motion to dismiss Strata Heights included Diaz's affidavit which contains a detailed account of a conversation in which he alleges that Barbosa made several fraudulent statements to him. A defendant may not evade the jurisdiction of the American courts simply by offering his own uncorroborated claim that the alleged tort never occurred when the plaintiff has offered competent evidence supporting his allegations. *See Byrd v. Corporacion Forestal,* 182 F.3d 380, 388 (5th Cir. 1999) (holding that once a defendant has established a prima

facie case that it is a foreign sovereign under the FSIA"the burden of production shifts to the [plaintiff]... to raise the exceptions and prove that they apply in this case").

For the foregoing reasons, Petrobras's Second Motion to Reconsider is DENIED.

It is so ORDERED.

Signed this 16th day of May, 2002.

/s/ _____
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-3052

[Filed January 21, 2002]

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION, and HEIGHTS ENERGY CORPORATION, Plaintiffs,	)
v.	)
PETROLEO BRASILEIRO S.A.- Petrobras, Defendant.	)

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] are: 1) Defendant's Motion to Dismiss; 2) Motion to Dismiss filed by Petrobras America, Inc, ("Petrobras America"); 3) Plaintiffs' Motion for Limited

[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 (b) (1) (A) & (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Fed. R. Civ. P. 72. Docket Entry No. 10.

Jurisdictional Discovery; and 4) Defendant's Motion to Strike Affidavit of Raymond A. Diaz. The court has considered the motions, all relevant filings, and the applicable law. For reasons set forth below, the court RECOMMENDS that Defendant's Motion to Dismiss (Docket Entry No. 20) be DENIED and that Petrobras America's Motion to Dismiss (Docket Entry No. 7) be DENIED as MOOT. Based on the decision contained within this Memorandum, Plaintiff's Motion for Limited Jurisdictional Discovery (Docket Entry No. 22) is unnecessary and, therefore, is DENIED as MOOT. As the court's decision does not hinge on any incompetent testimony contained within the Affidavit of Raymond A. Diaz, Defendant's Motion to Strike Affidavit of Raymond A. Diaz (Docket Entry No. 24) is DENIED.

I. CASE BACKGROUND[2]

Plaintiffs brought suit against Defendant for breach of contract, promissory estoppel, quantum meruit, fraud and misrepresentation pursuant to Texas common law, as well as what appear to be similar contract, quasi-contract, and tort actions under Brazilian statutory and constitutional law.

Plaintiffs and Defendant first made contact at an Offshore Technology Conference ("OTC") held in Houston. According to Plaintiffs, Defendant sought partners for the development of its oil and gas fields in Brazil. At the 1996 OTC, Joel Mendes Renno, Defendant's president, spoke about these partnership opportunities. Based on the conference

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[2] Facts as stated in Plaintiffs' First Amended Original Complaint ("Amended Complaint"), Docket Entry No. 15.

solicitations and one phone conversation with a representative from Petrobras America, Plaintiffs opted to enter negotiations with Defendant to jointly develop certain oil and gas fields in Brazil.

Plaintiffs advised Defendant that in order to invest in Brazil, they required a combination of exploration and production projects. Plaintiffs signed a Memo of Understanding ("MOU") governing issues of confidentiality, and Defendant provided a description of the projects available for joint development. Defendant initially offered Plaintiffs development and exploration projects and promised that rejuvenation field opportunities would follow. Plaintiffs selected two projects, BES-I in Espirito Santo and BSF-I in Sao Francisco, for technical review. Defendant confirmed the availability of Plaintiffs' selected projects. Plaintiffs executed an Agreement on Technical Assistance ("ATA") and paid Defendant $20,000 in U.S. currency for technical data on the projects.

Plaintiffs submitted to Defendant the results obtained from their field inspections and technical data evaluations of the project sites. In addition to Plaintiffs' work proposal and projected investment in the two projects, the technical evaluation included seismic and salt dome analysis. After accepting Plaintiffs' final ATAs and proposals for both projects, Defendant abandoned the BES-I project in Espirito Santo. Without consulting with Plaintiffs, Defendant assigned the project to Agencia Nacional de Petrolio ("ANP"), the Brazilian regulatory agency. Plaintiffs requested that Defendant replace the loss of the BES-I project with another producing property.

In March 1998, Defendant offered Plaintiffs multiple rejuvenation projects to replace the abandoned BES-I. The parties also agreed on the terms and conditions of the partnership and operating agreements for the development of the BSF-I project. Plaintiffs inspected and evaluated the new locations and submitted technical proposals. At this point, the parties negotiated terms and conditions of the rejuvenation projects' Technical Assistance Contract ("TAC"), a production-sharing agreement comprised of a Heads of Agreement, an Operating Agreement, accounting provisions, and other documents. The parties agreed that Defendant would draft the agreements necessary for the TAC. By May, the parties had reached agreement as to all the material terms for the development of the BSF-I in Sao Francisco. Then, Defendant advised Plaintiffs that it had surrendered the BSF-I project to the ANP.

When the parties met again in Rio de Janeiro in August 1999 to complete negotiations on the Operating Agreement for the rejuvenation projects, the parties reduced to final written form all the terms and conditions of the Heads of Agreement, the Operating Agreement, and the accounting provisions. Only Plaintiff Strata Heights International ("SHI") signed the Heads of Agreement. Plaintiff SHI was assured that Defendant's Board of Directors had approved the agreement. Later, Defendant advised Plaintiff SHI that its Board of Directors decided to sell the properties outright, rather than enter into a production agreement with Plaintiffs.

In lieu of entering into the production agreement, Defendant offered to sell to Plaintiff SHI sixteen producing fields and one exploration block on a preferred basis,

essentially giving Plaintiff SHI a right of first refusal. Defendant provided Plaintiffs with maps and technical data on these properties. Defendant also represented to Plaintiff SHI that both Jose Coutinho Barbosa ("Coutinho Barbosa"), Defendant's director of exploration and production, and Carlos Alberto Pereira de Oliveira, Defendant's superintendent, approved of the preferential privately negotiated sale to Plaintiff SHI. Later, while in Houston, Coutinho Barbosa represented to Raymond Diaz ("Diaz"), Plaintiff SERC's president, that the sale of the oil fields on a preferred, private basis was legal under Brazilian law. Coutinho Barbosa also indicated that he had approved the proposed sale. Plaintiff SHI thereafter asked Defendant for written confirmation of the properties and preferences Defendant had offered Plaintiffs. In response, Defendant sent Plaintiff SHI a unsigned draft of a confirmation letter, but never forwarded a signed version.

On March 13, 2000, Defendant advised Plaintiff SHI that, under Brazilian law, the properties must be sold through a public auction. Defendant, however, allowed that Defendant would grant Plaintiff SHI some type of a competitive advantage in the bidding process. Defendant ultimately denied Plaintiffs any preference and, in fact, ceased all negotiations with Plaintiffs, explaining that Brazilian law prohibited Defendant from selling assets directly to private parties.

On May 18, 2000, Plaintiff SHI sent a letter to Defendant suggesting that they resume the partnership originally contemplated, but Defendant did not respond. Plaintiffs also learned that Defendant published a public notice inviting bids for the sale of certain marginal fields, including those

previously offered to Plaintiffs. On July 20, 2000, Plaintiff SHI sent another letter to Defendant proposing that the negotiated fields be excluded from the public bidding process and the parties move forward with their original plans. Plaintiff SHI gave Defendant ten days to respond, but Defendant failed to do so.

On September 1, 2000, Plaintiffs filed their Original Complaint before this court.[3] Plaintiffs served Idelso Piazza of Petrobras America in Houston, as agent for Defendant.[4] Petrobras America filed a Motion to Dismiss for insufficiency of process and for failure to state a claim upon which relief could be granted.[5] Subsequently, Plaintiffs served Defendant in Houston through Coutinho Barbosa.[6] Defendant filed its motion to dismiss[7] after Plaintiffs amended their complaint with leave of court.[8]

As the court understands Plaintiffs' First Amended Complaint, Plaintiffs' claims can be divided into three broad categories. First, they allege that Defendant's failure to comply with the agreements to jointly develop the BSF-I and

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[3] Docket Entry No. 1.

[4] Summons, Docket Entry No. 6.

[5] Docket Entry No. 7.

[6] Summons, Docket Entry No. 17.

[7] Docket Entry No. 20.

[8] Docket Entry Nos. 15, 19.

the rejuvenation projects amounted to breaches of contract actionable under U.S. and Brazilian laws. Second, they claim that equity, pursuant to quasi-contract legal theories and Brazilian statutory law, requires that they be awarded damages as restitution for their work in reliance on Defendant's promises and as compensation for Defendant's unjust enrichment. Third, Plaintiffs claim that Defendant's misrepresentations as to its intention to execute the TAC and as to the legality of its offers to grant Plaintiffs an exclusive right of first refusal are violations of Texas common law and Brazilian statutory and constitutional law.

II. DEFENDANT'S MOTION TO DISMISS

On April 2, 2001, Defendant filed this motion asking the court to dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, lack of venue, and forum non conveniens. At this juncture, Defendant does not challenge the sufficiency of Plaintiffs' complaint with regard to the merits of their enumerated causes of action.

A. SUBJECT MATTER JURISDICTION

The Foreign Sovereign Immunities Act ("FSIA") provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)); *see also* 28 U.S.C. § 1330(a). Under the FSIA, "foreign states" receive presumptive grants of immunity from the jurisdiction of U.S. courts unless one of the exceptions defined in the FSIA

applies. 28 U.S.C. § 1604; *Nelson*, 507 U.S. at 355; *Byrd v. Corporacion Forestal y Industrial de Olanchos S.A.*, 182 F.3d 380, 388 (5th Cir. 1999).

To properly invoke immunity under the FSIA, a defendant has the initial burden of making a prima facie showing that it is a foreign state as defined under the FSIA. *Byrd*, 182 F.3d at 388; *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadore Petroleros de la Republica Mexicana*, 923 F.2d 380, 390 n.14 (5th Cir. 1991). This shifts the burden of proof to the plaintiff to raise one of the exceptions to sovereign immunity set forth in the FSIA and to assert some facts that will establish the exception. *Byrd*, 182 F.3d at 388; *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 481 (5th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999); *Stena Rederi AB*, 923 F.2d at 389-90. If the plaintiff successfuliy invokes an exception under the FSIA, the court will have subject matter jurisdiction over the claim against the foreign state defendant. *Verlinden B.V.v. Cent. Bank of Nig.*, 461 U.S. 480, 488-489 (1983). The defendant has the final burden of persuasion and, therefore, ultimately must prove the non-applicability of the exception raised by the plaintiff. *Pere*, 150 F.3d at 481; *Voest-Alpine Trading USA Corp v. Bank of China*, 142 F.3d 887, 896 (1998), *cert denied*, 525 U.S. 1041 (1998). Whether the court has subject matter jurisdiction under the FSIA is a question of law. *Stena Rederi AB*, 923 F.2d at 386.

Defendant asks this court to dismiss Plaintiffs' Amended Complaint on the basis that Defendant is an agency or instrumentality of a foreign state entitled to immunity under the FSIA. Plaintiffs, on the other hand, argue that Defendant

has not carried its burden of showing it is a foreign state under the FSIA; and, even if it is a foreign state, Defendant engaged in activity that falls under the "commercial activity" exception of the FSIA.

1. Agency or Instrumentality of a Foreign State

To determine whether Defendant is entitled to the benefits of the FSIA, the court must first resolve whether Defendant carried its burden of showing that it is a "foreign state" as defined by the FSIA. *Byrd*, 182 F.3d at 388. Section 1603 of the FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" is further defined as an entity:

> (1) which is a separate legal person, . . . and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country. 28 U.S.C. §§ 1603(b).

In support of its assertion of immunity, Defendant argues that it is an "agency or instrumentality" as defined by the FSIA because it is the majority-owned national oil company of the Republic of Brazil. Plaintiffs claim Defendant must show that Brazil owns a majority of all stock, not simply voting stock, in order to establish that it is an agency of the

foreign state. In response, Defendant submitted the declaration of Rui Berford Dias, an attorney licensed to practice in Brazil, who is employed by Defendant.[9] In pertinent part, the declaration states that by government decree, Defendant was established as the state-owned oil company under Brazilian law.[10] The declaration also sets forth that the federal government of Brazil owns the majority of the shares of voting capital and that throughout Defendant's history, it has been controlled by the Brazilian government.[11]

In a previous case, the Fifth Circuit recognized that Defendant is a foreign sovereign entitled to the benefits of the FSIA. *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro*, S.A., 875 F.2d 1174, 1176 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990). Plaintiffs argue that circumstances have changed since that ruling. However, this court finds that Defendant has asserted sufficient facts to satisfy its prima facie burden of showing that it is an agency or instrumentality of the Republic of Brazil. Defendant, therefore, is entitled to sovereign immunity unless one of the FSIA's exceptions applies.

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[9] Defendant's Reply Brief in Further Support of its Motion to Dismiss ("Defendant's Reply"), Docket Entry No. 23, Ex. C, Declaration of Rui Berford Dias.

[10] *Id.*

[11] *Id.*

2. Commercial Activity Exception

The FSIA sets forth eight exceptions to the presumptive grant of sovereign immunity. 28 U.S.C. § 1605. Plaintiffs assert that the commercial activity exception applies in this case to strip Defendant of immunity. The commercial activity exception states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a) (2).

Even a cursory review of this section reveals three basic requirements for its application: 1) the foreign state's relevant activity must be commercial[12] in nature, rather than sovereign;

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[12] The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or

2) the conduct underlying Plaintiffs' causes of action must be connected with that commercial activity; and 3) the commercial activity must have a jurisdictional nexus to the United States. *See Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 673 (5th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000)(citing *de Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 13.91 (5th Cir. 1985)); *Voest-Alpine Trading USA Corp.*, 142 F.3d at 892. In this case, it is undisputed that the proposed development of Defendant's oil and gas fields was commercial in nature. Defendant contends that Plaintiffs fail to establish the required jurisdictional nexus between Defendant's conduct and the United States. Plaintiffs assert that the second and third clauses of 28 U.S.C. § 1605 (a) (2) support subject matter jurisdiction over Defendant.[13]

Regarding the second clause, Plaintiffs' cause of action must "be based upon (1) an act in the United States (2) in

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particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). This definition is of limited assistance in analyzing the facts of particular cases because it fails specifically to define "commercial." *See Nelson*, 507 U.S. at 359; *Republic of Arqentine v. Weltover*, 504 U.S. 607, 612 (1992). So, the United States Supreme Court clarified that a foreign state engages in commercial activity when it participates in the market as would a private player. *Nelson*, 507 U.S. at 360; *Weltover*, 504 U.S. at 614. Defendant does not dispute the commercial nature of its interactions with Plaintiffs.

[13] In a recent filing, Plaintiffs assert that the first clause of the commercial activity exception also applies. *See* Rule 72 Objections to Magistrate's Order and Recommendation, Docket Entry No. 29. The court does not consider this untimely argument.

connection with commercial activity outside the United States." *Voest-Alpine Trading USA Corp.*, 142 F.3d at 895. Plaintiffs allege that Coutinho Barbosa, while in Houston, falsely represented to Diaz that the proposed private sale of seventeen properties in Brazil was legal under Brazilian law.[14] Plaintiffs contend that this act and their reliance on it form the basis for their claims of fraud and misrepresentation under the laws of Texas and Brazil. Because Coutinho Barbosa made the remarks to Diaz in connection with Defendant's development of its oil and gas fields, Plaintiffs contend that the second required element of this clause is also met.

Defendant does not argue that the conversation did not take place or that Coutinho Barbosa did not say the things attributed to him. Rather, Defendant argues that "this single statement cannot form the basis for a lawsuit, much less the basis for which to hale a foreign sovereign into a United States court."[15] Defendant characterizes this conversation as an isolated encounter amid extensive negotiations, most of which took place in Brazil. Therefore, according to Defendant, this one act in the United States is insufficient to overcome sovereign immunity. The court disagrees with Defendant's analysis.

Defendant misplaces emphasis on a comparison of the many events which occurred in Brazil with the one event

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[14] Plaintiffs' Response to Defendant's Motion to Dismiss ("Plaintiffs' Response"), Docket Entry No. 22, Affidavit of Raymond Diaz.

[15] Defendant's Reply, Docket Entry No. 23.

Plaintiffs allege occurred in the United States. "Isolated," as the term is employed in this context by Fifth Circuit case law, refers to the requirement that a material connection exist between the cause of action and the foreign sovereign's commercial activity. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992), *cert. denied*, 506 U.S. 956 (1992); *Stena Rederi AB*, 923 F.2d at 387.

> In order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based. . . . Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity.

Stena Rederi AB, 923 F.2d at 387. In that case, the defendant conducted commercial activity in the United States, but that activity did not form the basis of the plaintiff's causes of action. *Id.*

Defendant here avers that the particular act in the United States about which Plaintiffs complain does not meet the commercial activity requirement for purposes of jurisdiction under the first clause of 28 U.S.C. § 1605(a) (2). However, Defendant wrongly concludes that the act therefore provides an insufficient basis for finding a jurisdictional nexus with the United States. It is important to reiterate that Plaintiffs are not alleging, pursuant to the first clause of 28 U.S.C. § 1605(a) (2), that Defendant's commercial activity in the United States underlies their fraud and misrepresentation causes of action;

but, instead, pursuant to the second clause, Plaintiffs are alleging that one specific act in the United States, which is connected to commercial activity in Brazil, forms the basis for some of their causes of action.

The *Stena Rederi AB* discussion of the second clause leaves no doubt that the Fifth Circuit intended to allow the words "an act performed in the United States" their plain meaning. *Id.* at 388 ("Thus, the material connection required by the commercial activities exception to sovereign immunity must exist between the plaintiff's cause of action and the act performed in the United States.") (emphasis in original). Although the Fifth Circuit in that case acknowledged a material connection between that plaintiff's complaints and the defendant's commercial activity elsewhere, it found no material connection between any of the acts that the defendant performed in the United States and the plaintiff's breach of contract cause of action. *Id.*; *see also Soudavar*, 186 F.3d at 674 (finding that jurisdiction was not proper because the plaintiff's causes of action were not based on representations made at a meeting in New York, the only act by the foreign sovereign which occurred in the United States). It is in this context that the Fifth Circuit explains that an "isolated event" is insufficient to support the exercise of jurisdiction. *Stena Rederi AB*, 923 F.2d at 388. Isolated, therefore, means removed from the plaintiff's cause of action.

Without a doubt Plaintiffs' allegations against Coutinho Barbosa, true or not, underlie their claims of fraud and misrepresentation. *See id.* at 389 (stating that any false representations made by the defendant's representative during a visit in the United States could provide "the very

foundation" for the plaintiff's misrepresentation claim and would support the exercise of jurisdiction as to that claim). Furthermore, those alleged misrepresentations are connected to Defendant's oil and gas business in Brazil. Plaintiffs have met their burden of offering some evidence to show that the second clause of the commercial activity exception applies to overcome sovereign immunity, at least with regard to their fraud and misrepresentation causes of action under U.S. and Brazilian law. Although other Defendant's acts in the United States are discussed in Defendant's motion, Plaintiffs limit their response, in connection with the second clause, to Coutinho Barbosa's representations. Plaintiffs offer no argument or evidence that any act related to their contract and quasi-contract causes of action occurred in the United States. Accordingly, this court has jurisdiction, pursuant to the second clause of the commercial activity exception, only over Plaintiffs' fraud and misrepresentation causes of action.

Under the third clause, Plaintiffs are required to show "(1) an act outside the United States (2) in connection with commercial activity outside the United States (3) that cause[d] a direct effect in the United States." *Voest-Alpine Trading USA Corp.*, 142 F.3d at 894. As evidence of a direct effect in the United States, Plaintiffs submit affidavit testimony and business records purporting to show that Plaintiffs suffered financial losses,[16] including expenditures of money, time, and

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[16] Other than the $20,000 Plaintiff paid to Defendant in exchange for technical data in connection with the ATA, Plaintiffs claim they lost: 1) more than $200,000 in property evaluation costs; 2) more than $850,000 in labor expenses; and 3) large sums in travel, due diligence efforts, and other expenses. Plaintiffs'

effort, as a result of Defendant's alleged breaches of the TAC, joint development agreements, and the agreed sale of Brazilian oil and gas properties.[17] According to Plaintiffs, all of which are U.S. corporations, Defendant's acts in Brazil were in connection with Defendant's commercial activity of developing its oil and gas fields, and those acts caused Plaintiffs' direct losses. Plaintiffs also claim that some of their losses resulted from fraud perpetrated by Defendant in Brazil.

Defendant argues that Plaintiffs' losses were due to their own unilateral efforts in furtherance of a transaction they eagerly sought. Such losses, Defendant contends, do not amount to a "direct effect" under the third clause of 28 U.S.C. § 1605(a) (2). Beneath the surface of this argument, no doubt, is Defendant's challenge of the formation and/or validity of the alleged separate contracts that Plaintiffs assert Defendant breached. Regardless of whether Plaintiffs can prove the existence of valid contracts or damages related to those particular contracts, Plaintiffs have alleged facts in support of their contract and quasi-contract causes of action. They have alleged that they lost money either because Defendant breached valid contracts or because benefits inured to Defendant as a result of Plaintiffs' services in a quasi-contractual relationship. What the court considers here is whether Plaintiffs have asserted facts to establish the existence of a direct effect in the United States resulting from Defendant's acts outside the United States in connection with its commercial activity elsewhere.

Response, Docket Entry No. 22, Affidavit of Raymond Diaz.

[17] *Id.*

Over the years, courts have struggled with the "direct effect" element of this third clause. *See Voest-Alpine Trading USA Corp.*, 142 F.3d at 893. However, since 1992, the law is clear that "[A]n effect is direct if it follows as an immediate consequence of the defendant's activity." *Soudavar*, 186 F.3d at 674 (quoting *Weltover*, 504 U.S. at 618 (eliminating the Fifth Circuit's requirements that the effect be foreseeable and substantial and, further, warning courts against adding any other unexpressed requirements)). Based on these modifications, the Fifth Circuit recently summarized, "a financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception to the FSIA." *Voest-Alpine Trading USA Corp.*, 142 F.3d at 897. In order to confer subject matter jurisdiction, the plaintiff's loss must be nontrivial. *Byrd*, 182 F.3d at 390.

In application of these principles, the Fifth Circuit found that the breach of a contractual duty to defend a plaintiff resulted in the direct effect that the plaintiff expended considerable sums of money to defend itself. *Walter Fuller Aircraft Sales, Inc. v. Republic of Phil.*, 965 F.2d 1375, 1387 (5th Cir. 1992). Because the other elements of the direct effect clause were met, the court found subject matter jurisdiction to be proper. *Id.* at 1389; *see also Aldy on Behalf of Aldy v. Valment Paper Mach.*, 74 F.3d 72, 75 (5th Cir. 1996), *cert. denied* 519 U.S. 817 (finding subject matter jurisdiction proper where the plaintiffs maintained that deaths in the United States resulted from negligent design and/or manufacture of products outside the United States); *Voest-*

Alpine Trading USA Corp., 142 F.3d at 896 (finding a direct effect in the United States where a foreign state failed to pay on a letter of credit, payable at a Texas bank, to an American corporation). Even in *Stena Rederi AB*, a pre-*Weltover* case, the Fifth Circuit suggested that a financial loss to an U.S. company would affect the United States and may support jurisdiction under the commercial activity exception. *Stena Rederi AB*, 923 F.2d at 390.

Here, Plaintiffs are U.S. corporations that assert significant financial losses as a result of Defendant's breach of contracts entered into in Brazil in connection with the development of Defendant's oil and gas properties.[18] Plaintiffs have submitted evidence in support of their assertion that Defendant either entered into contracts with Plaintiffs prompting Plaintiffs' performance or unjustly benefitted from Plaintiffs' efforts.[19] Plaintiffs are far from proving their claims, but they have shown, for purposes of jurisdiction, that their losses were a direct effect of Defendant's commercial activity. Under Plaintiffs' version of the facts, Plaintiffs suffered losses as an immediate consequence of Defendant's promises and representations. Based on Plaintiffs' allegations, this court is left with no alternative but to find subject matter

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[18] Defendant contends that Plaintiffs' accounting of damages includes losses prior to 1999, the year in which Plaintiffs represent that their claims arose. Even if some of Plaintiffs' alleged damages were associated with the MOU and the ATA and, therefore, are not part of the case, Plaintiffs' damages still are more than trivial.

[19] Plaintiffs' Response, Docket Entry No. 22, Affidavit of Raymond Diaz.

jurisdiction, under the third clause of 28 U.S.C. § 1605(a)(2), for Plaintiffs' contract and quasi-contract causes of action under U.S. and Brazilian law.

Although it is of no practical significance due to the court's findings with regard to the second clause of the commercial activity exception, Plaintiffs fail to meet their burden under the third clause with regard to their fraud and misrepresentation claims. They simply do not assert specific facts which demonstrate that Defendant's fraudulent acts in Brazil contributed to their financial losses.

Based on the above analysis, the court finds that the commercial activity exception confers jurisdiction on this court over all of Plaintiffs' asserted causes of action.

B. PERSONAL JURISDICTION

Personal jurisdiction exists over a foreign state "as to every claim for relief over which the district courts have [subject matter] jurisdiction . . . where service has been made under section 1608 of this title." 28 U.S.C. S 1330(b); *see also In re B-727 Aircraft Ser. No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001); *Kelly v. Syria Shell Petroleum Dev.*, 213 F.3d 841, 845-46 (5th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000); *Amerada Hess Shipping Corp.*, 488 U.S. at 435 n.3. The FSIA allows for service upon an agency or instrumentality of a foreign state "by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." 28 U.S.C. § 1608(b)(2).

Although not specifically required by the statutory scheme, the exercise of personal jurisdiction still must comply with constitutional due process requirements, *de Sanchez*, 770 F.2d at 1390 n.4 (5th Cir. 1985) (citing *Tex. Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 n.5 (5th Cir. 1985) (same). The due process clause allows personal jurisdiction over nonresident defendants who have purposefully established minimum contacts with the forum if the exercise of jurisdiction "would not offend 'traditional notions of fair play and substantial justice.'" *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) and *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

In analyzing the contacts of a foreign sovereign served under the FSIA, the court takes into consideration the contacts of the defendant, through its agents, with the entire United States.[20] *Tex. Trading & Milling Corp.*, 647 F.2d at 314.

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[20] Defendant urges the court to disregard the *Tex. Trading & Milling Corp.* decision because it is not binding precedent and because no Fifth Circuit case has held that nationwide contacts that are to be considered. Defendant cites *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 534-36 (S.D. Tex. 1994), as holding that the only relevant contacts for purposes of personal jurisdiction are those with the forum state, not the nation as a whole. Defendant misapplies the *Kern* case. In that case, the court found that one of the defendants qualified as a foreign sovereign entitled to immunity and that the plaintiffs failed to show that an exception within the FSIA applied. *Id.* at 531. Therefore, the court did not have subject matter jurisdiction with regard to claims against that defendant. *Id.*

Continuous and systematic contacts are grounds for the exercise of personal jurisdiction for any cause of action regardless of whether the claim arose from specific activity within the forum. *Bullion*, 895 F.2d at 216. Furthermore, personal jurisdiction may exist if the asserted cause of action is related directly to the defendant's contact with the forum. *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 718 (5th Cir. 1999), *cert. denied*, 531 U.S. 917 (2000).

The key considerations for deciding whether personal jurisdiction comports with the due process clause are: 1) the extent to which the defendant availed itself of the privileges of U.S. law; 2) "the extent to which litigation in the United States [was] foreseeable;" 3) the *inconvenience* of litigation in the United States; and 4) "the countervailing interest of the United States in hearing the suit." *Tex. Trading & Milling Corp.*, 647 F.2d at 314; *see also Ruston Gas Turbines. Inc. v. Donaldson Co.*, 9 F.3d 415, 421 (5th Cir. 1993) (listing the fairness issues as: "(1) the defendant's burden; (2) the forum state's interests; (3) the plaintiff's interest in convenient

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However, *in the alternative*, the court examined personal jurisdiction as to that particular defendant. *Id.* at 534. That is to say, the court analyzed personal jurisdiction over that defendant as if it were not a foreign state. Because the court did not analyze personal jurisdiction pursuant to 28 U.S.C. § 1330(b), that decision has no bearing on this case. Furthermore, although the Fifth Circuit has not specifically adopted the national rule of minimum contacts as articulated in *Tex. Trading & Milling Corp.*, it has cited the case favorably with regard to the personal jurisdiction analysis under the FSIA. *See de Sanchez*, 770 F.2d at 1390 n.4; *Callejo*, 764 F.2d at 1107 n.5.

and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the state's shared interest in furthering fundamental social policies."). Personal jurisdiction must be established by the party seeking to invoke the court's jurisdiction. *Allred v. Moore & Peterson*, 117 F.3d 278, 281 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998). However, once a plaintiff establishes minimum contacts, "the burden shifts to the defendant to show the assertion of jurisdiction would be unfair." *Wein Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999).

Defendant argues that no FSIA exception to immunity applies and that the exercise of personal jurisdiction would violate due process requirements. Specifically with regard to due process considerations, Defendant argues that Plaintiffs have not established that Defendant had sufficient contacts to justify either general or specific jurisdiction and that the burden on Defendant to defend an action in a U.S. court would be great. Plaintiffs counter with evidence that Defendant committed an action in the United States that underlies its fraud causes of action and on several occasions sent officers to the United States to solicit business.[21]

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[21] Plaintiffs' Response, Docket Entry No. 22, Affidavit of Raymond Diaz. Although not competent evidence, Diaz stated that he believes Defendant has maintained permanent offices in New York for at least thirty years and regularly conducts business in the United States, including entering contracts to sell oil to U.S. corporations and to acquire refineries and pipeline systems in the United States. *Id.* The court recognizes that Defendant carries no burden to prove that it does not have minimum contacts with the United States. Even so, the court finds it interesting that Defendant

Plaintiffs also assert that Petrobras America is an alter ego for Defendant and Petrobras America's activities in the United States are, therefore, attributable to Defendant. The court does not reach this last argument as it finds that Defendant's own contacts with the United States are sufficient to justify the exercise of personal jurisdiction without offending "traditional notions of fair play and substantial justice."

Beginning with the requirements particular to the FSIA, the court finds that Defendant is not immune under the FSIA[22] and that the record contains evidence of service effected in compliance with 28 U.S.C. § 1608(b) (2).[23] As for general jurisdiction, Defendant suggests that it simply sent representatives to attend conferences and seminars in the United States. Plaintiffs submit evidence that those representatives actually solicited business partners from among U.S. attendees.[24] Diaz testified that he witnessed Defendant's representatives advertising these opportunities in

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does not deny these particular averments. If true, these facts only strengthen the court's analysis presented in this Memorandum.

[22] *See* discussion infra Part III.A.

[23] *See* Summons, Docket Entry No. 17. The return of service was signed by Coutinho Barbosa, indisputably an officer of Defendant. The court notes, in order to avoid any confusion, that the relevant service is not Plaintiffs' original service of Petrobras America, but the February 2001 service, the efficacy of which is not challenged.

[24] Plaintiffs' Response, Docket Entry No. 22, Affidavit of Raymond Diaz.

Texas, in California, and in print.[25] These solicitations, which occurred in connection with at least four conferences over the course of three years, amount to continuous and systematic contacts with the United States. Although not great in number, these actions by Defendant were purposefully directed toward the United States. Defendant, on its own initiative, marketed its product, oil and gas development opportunities, in Texas and California. Defendant employed its subsidiary as a contact for potential partners. Furthermore, the commission of an allegedly fraudulent act in the United States, an act upon which Plaintiffs base their claims, subjects Defendant to specific jurisdiction.

The court finds that the fairness considerations do not warrant a different decision. Defendant's actions, particularly the solicitation of business in the United States, demonstrate its intent to benefit from this nation's legal and commercial climate. The court recognizes that Defendant endeavored to avoid litigation here. Of course, those very efforts reveal some awareness of the possibility that it may be haled into court in the United States. The burden on Defendant of litigation in the United States is no greater than Plaintiff's interest in convenient and effective relief. Travel to and from Brazil is no great inconvenience to Defendant, as demonstrated by its willingness to send representatives to the United States in order to develop business relationships with U.S. companies. Finally, in an international commercial market, the United States retains a vested interest in adjudicating disputes involving U.S. citizens. Defendant has

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[25] *Id.*

not demonstrated that, despite sufficient contacts with the United States, the exercise of personal jurisdiction would be unfair. The court finds that it has personal jurisdiction over Defendant.

C. VENUE

In a civil action against a foreign state, venue is proper "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" or "in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state." 28 U.S.C. § 1391(f).

Defendant challenges venue by asserting that a forum-selection clause contained in the MOU requires that this dispute be resolved in Brazil.[26] Further, the ATA fully

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[26] The pertinent part of the MOU states:

> Any dispute, controversy or claim arising out of or relating to this MOU or the breach, termination or invalidity hereof, which cannot be settled amicably between the Parties shall be settled by arbitration to be conducted in Rio de Janeiro in the Portuguese language, in accordance with the rules of the United Nations Commission on International Trade Law.

Defendant's Motion to Dismiss, Docket Entry No. 20, Ex. A, MOU, § 5.2. Plaintiffs and Defendant debate the validity of the forum-selection clause in light of the time expiration of the MOU. The court finds validity a nonissue because Plaintiffs' claims are beyond the scope of the MOU, as explained.

incorporated the MOU.[27] Plaintiffs, on the other hand, argue that the forum-selection clause of the MOU does not apply to this case because it "specifically restricts itself to actions regarding or arising from the MOU itself."[28]

After carefully reviewing the Amended Complaint, the court agrees with Plaintiffs that none of their claims arise out of any breach or commission of fraud related to the MOU or the ATA. Rather, Plaintiffs assert that Defendant breached the joint development agreements, the TAC, and the preferred purchase agreement.[29]

It does not appear that the MOU and the ATA were intended to bind the parties or limit, in any way, their subsequent contractual relationship. The MOU was a preliminary agreement that established certain ground rules for the exchange of data and the commencement of negotiations.[30] It did not identify particular properties for development.[31] Likewise, the ATA was a preliminary agreement related to the release of data on several projects

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[27] Defendant's Motion to Dismiss, Docket Entry No. 20, Ex. B, ATA.

[28] Plaintiffs' Response, Docket Entry No. 22.

[29] Amended Complaint, Docket Entry Number 15.

[30] Defendant's Motion to Dismiss, Docket Entry No. 20, Ex. A, MOU.

[31] *Id.*

including the BSF-I and the BES-I, in exchange for $20,000.[32] The ATA fully contemplates future negotiations and subsequent contracts.[33] For example, the ATA stated:

> This ATA is not intended to constitute rights nor should it be construed as constituting a firm offer from [Defendant] to proceed to the next steps of execution of competent agreements, nor creating any obligation on [Defendant] to sell or otherwise dispose of all or part of its interest in any Areas under this Agreement.[34]

The ATA does not outline the parties' obligations or rights related to the development or operation of the oil and gas projects. The court finds no evidence to support Defendant's suggestion that the MOU and the ATA somehow govern all subsequent agreements between the parties. That is explicitly not the case.

Because the forum-selection clause cannot be extended beyond the scope of the MOU, it does not apply to these other alleged contracts. *Cf. Tex. Source Group, Inc. v. CCH, Inc.*, 967 F. Supp. 234, 238 (S.D. Tex. 1997) (recognizing the continued validity of a forum-selection clause beyond the

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[32] Defendant's Motion to Dismiss, Docket Entry No. 20, Ex. B, ATA.

[33] *Id.*

[34] Defendant's Motion to Dismiss, Docket Entry No. 20, Ex. B, ATA, § 4.1.

expiration of the hosting contract, but only as to claims directly and indirectly related to the agreement containing the clause). As Defendant makes no other challenges to venue, the court finds venue to be proper within this district.

D. FORUM NON CONVENIENS

The doctrine of forum non conveniens allows a court to decline to exercise jurisdiction so that the case may be tried in a foreign forum where "the convenience of the parties and the ends of justice" will be best served. *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947). A two-prong test is used to determine whether forum non conveniens justifies dismissal. *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999). The first prong requires ascertaining whether there is an adequate and available alternative forum. *Id.* If such a forum exists where Defendant is amenable to service, the court must balance several public and private interest factors affecting the convenience of the forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (explicating principles for common law forum non conveniens, limited now only to the extent that 28 U.S.C. § 1404(a) addresses transfer of venue, formerly a forum non conveniens issue).

The plaintiff's choice of forum should be given great deference and should not be disturbed, unless there is a clear showing that it would oppress and vex the defendant out of proportion to the plaintiff's convenience, or that it would make trial inappropriate because of considerations affecting the court's own administrative and legal problems. *Koster*, 330 U.S. at 524. In *Piper Aircraft CO. v. Reyno*, the United

States Supreme Court held that a strong showing of substantial inconvenience and inappropriateness is necessary to sustain a forum non conveniens dismissal. 454 U.S. 235, 249 (1981). As such, the burden of proof in a forum non conveniens analysis rests with the party seeking dismissal. *See id.*

1. Adequate and Available Alternative Foreign Forum

A foreign forum is deemed adequate if the parties will be treated fairly and will not be deprived of all remedies. *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 828-29 (5th Cir. 1986). The forum is available if the entire case and all of the parties will fit within its jurisdiction. *Id.* at 829-30.

Defendant contends that Brazil is an adequate and available alternative forum. Defendant asserts that although the parties may not receive the same benefits available in U.S. courts, they will not be deprived of all remedies or otherwise be treated unfairly. As a Brazilian entity, Defendant claims that it is amenable to service of process in Brazil. Finally, Defendant argues that other courts have found Brazil to be an adequate and available forum for purposes of the forum non conveniens analysis.

Plaintiffs reject Defendant's arguments, asserting that they may be treated unfairly in Brazil or may find it difficult to retain competent local counsel based on Defendant's status as a government-owned entity. Plaintiffs note that the Brazilian forum would require Plaintiffs to pay a percentage of the claim as a fee to the court and would assess all costs to the loser. According to Plaintiffs, these and other procedural

differences combine to create a bar to judicial relief in Brazil. The court disagrees.

In *Piper Aircraft Co.*, the United States Supreme Court held that the alternative forum is inadequate only if a party would be "deprived of any remedy or [would be] treated unfairly." *Piper Aircraft Co.*, 454 U.S. at 255. In that case, the United States Supreme Court found the Scottish courts to be an alternative forum that was adequate and available despite differences in the substantive law which were less favorable to the plaintiffs. *Id.* Here, Plaintiffs have shown only that the prosecution of their suit would be more difficult in Brazil, not that the case could not be heard or that the remedy would be "so clearly inadequate or unsatisfactory that it is no remedy at all." *See id.* at 254.

Therefore, Brazil is an adequate and available alternative forum, and the court now turns to the balancing test required under the second prong of the forum non conveniens analysis.

2. Balancing of Public and Private Interest Factors

The final determination of convenience depends on the balance of public and private interest factors, none of which is conclusive. *Dickson Marine Inc.*, 179 F.3d at 342. The Fifth Circuit recently affirmed that the private interest factors related to the convenience of the parties are: 1) the relative ease of access to sources of proof; 2) the availability of compulsory process for attendance of unwilling witnesses; 3) the cost of obtaining attendance of willing and unwilling witnesses; 4) the possibility of viewing the premises, if viewing would be appropriate to the action; and 5) all other

practical problems that make trial easy, expeditious, and inexpensive. *Id.* The public interest factors are:

> [1)] the administrative difficulties flowing from court congestion; [2)] the local interest in having localized controversies decided at home; [(3)] the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; [(4)] the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and [(5)] the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. (quoting *Piper Aircraft Co.*, 454 U.S. at 241 n.6) (internal quotations omitted). A forum non conveniens determination is committed to the sound discretion of the trial court. *Piper Aircraft Co.*, 454 U.S. at 257.

Defendant argues that "Brazil is patently the more convenient forum." Naturally, Plaintiffs' assessment of the private and public factors leads them to the opposite conclusion. The bottom line is that this case involves equal parts Brazilian and U.S. sources of proof, witnesses, interests, and law. Defendant's cursory and one-sided analysis of the private and public interest factors fails to convince the court that it should shift the burden of foreign litigation to Plaintiffs. Taking the private interest factors one at a time, the court finds none which would indicate that the inconvenience to Defendant of litigation in the United States would oppress and vex Defendant out of proportion to Plaintiffs' convenience. In fact, Defendant's brief gives very

little attention to specific difficulties it faces in the United States.

Proof related to this case, no doubt, will consist primarily of documentation and witness testimony. The relevant documents are very likely equally divided between the parties. As for witnesses, Plaintiffs list the names of fifteen witnesses and employees who reside in the United States and therefore would be subject to compulsory process if required. Defendant counters that this court cannot compel attendance of "a vast majority of witnesses [that] reside" in Brazil, but fails to list the names of any such potential witnesses.[35] Plaintiffs assert that all of the potential witnesses from Brazil are employees of Defendant who can be compelled to attend trial in the United States. The cost of obtaining attendance and the compulsion of willing and unwilling witnesses would affect either party if trial were held in the opposite forum. Because this case concerns contractual matters, viewing the premises is not likely to be necessary. Finally, other practical problems include the procedural and economic disadvantages Plaintiffs would face if forced to litigate in Brazil. Although not reiterated by Plaintiffs, issues raised in their discussion of the availability and adequacy of Brazil as an alternative forum are equally applicable here. These include difficulties in retaining local Brazilian counsel, increased costs of litigation, differences in court procedure, language barriers, and the potential of bias for bringing suit against a state-owned agency.

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[35] Defendant's Motion to Dismiss, p. 24, Docket Entry Number 20.

Similarly, the public interest factors do not warrant dismissal for forum non conveniens. Court congestion is a minimal concern in this forum where parties are properly before the court. Because of the international nature of this suit, administrative difficulties will arise regardless of where the parties' dispute is litigated. The court also finds no impediment to hearing this case. Certainly each forum has a vested interest in trying this controversy. To the extent Plaintiffs assert that Defendant committed fraud in the United States, this forum has a heightened interest in the outcome. Also, Plaintiffs' allegations that Defendant solicits business partners within this forum and that U.S. Plaintiffs suffered financial loss increase local concern. As Plaintiffs assert causes of action under both Brazilian and U.S. law, either forum would be required to engage in a choice of law analysis and to resolve issues of domestic and foreign law. Finally, FSIA cases are non-jury suits, and, therefore, no citizens in this forum will be burdened with jury duty for this case. *See* 28 U.S.C. § 1330.

Despite having Brazil as an adequate and available alternative forum, Defendant failed to carry the ultimate burden of showing a substantial inconvenience and inappropriateness of this forum. As a result, the court holds that Plaintiffs' choice of forum should not be disturbed.

III. PETROBRAS AMERICA'S MOTION TO DISMISS

Petrobras America became involved in this action on November 21, 2000, when it was served by Defendant.[36] Petrobras America filed a Motion to Dismiss,[37] which apparently remains pending, alleging that service was erroneous because it was not a party named in the complaint. Plaintiffs subsequently served Defendant on February 13, 2001.[38] Petrobras America is not a party to this suit. Therefore, dismissal of Petrobras America is unnecessary. The court RECOMMENDS that Petrobras America's Motion to Dismiss be DENIED as MOOT.

IV. CONCLUSION

Based on the foregoing, the court RECOMMENDS that Defendant's Motion to Dismiss be DENIED, and that Petrobras America's Motion to dismiss be DENIED as MOOT. Plaintiff's Motion for Limited Jurisdictional Discovery is DENIED as MOOT and Defendant's Motion to Strike Affidavit of Raymond A. Diaz is DENIED.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have ten (10) days from the receipt thereof to file written objections thereto pursuant to General Order 2001-6. Failure to file written

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[36] Summons, Docket Entry No. 6.

[37] Docket Entry No. 7.

[38] Summons, Docket Entry No. 17.

objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas, 77208. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED at Houston, Texas this 18th day of January, 2002.

/s/ _____
NANCY K. JOHNSON
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
SEP 29 2003
OFFICE OF THE CLERK

No. 03-313

In The
Supreme Court of the United States

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION, and HEIGHTS ENERGY CORPORATION,

Petitioners,

v.

PETRÓLEO BRASILEIRO, S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. In a contract between United States corporations and a foreign corporation there is a forum selection clause that mandates that disputes concerning or relating to the contract be resolved in arbitration in a foreign country. The contract has a survivability clause that does not provide for the extension of the forum selection clause. After the termination of the contract, does the forum selection clause govern every other subsequent contract or tortious act between those entities?

2. What is a Court of Appeals' proper standard of review over a district court's order on a motion to dismiss due to a forum selection clause?

3. What is the proper procedural vehicle to raise a forum selection clause issue?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, the following name is added to the list of parties to the proceeding appearing at page ii of the Petition for Writ of Certiorari:

Republic of Brazil (the Federal Government of Brazil owns 55.71% of the shares of voting capital in Defendant/Respondent Petróleo Brasileiro, S.A). (R. at 392.)

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STATEMENT OF THE CASE

Summary of the Argument

This case involves nothing more than the straightforward application of a forum selection clause requiring that all disputes relating to agreements between the parties about the development of oilfield projects in Brazil be resolved by arbitration in Brazil. That clause provides as follows:

> Any dispute, controversy or claim arising out of or relating to this [Memorandum of Understanding] or the breach, termination or invalidity hereof, which cannot be settled amicably between the parties, shall be settled by arbitration to be conducted in Rio de Janeiro in the Portuguese language. . . .

(R. at 116.) As the United States Court of Appeals for the Fifth Circuit said, the case turns on "the interpretation of unambiguous contract language." (Joint Appendix at 20a.)

As explained in more detail below, this Court should deny the petition for writ of certiorari because: (1) the first Question Presented is a fact-bound matter of contract interpretation; (2) contrary to Petitioners' suggestion, Respondent actually invoked the forum selection clause under the rule that Petitioners say is the proper method for invoking a forum selection clause; (3) Petitioners failed to preserve error on the second and third Questions Presented; (4) under any test or any standard, there is no reason to think this forum selection clause would not be enforced; and (5) the opinion by the Fifth Circuit is unpublished and is not binding precedent on any court. Accordingly, the petition for writ of certiorari should be denied.

Statement of Facts

Petitioners Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (collectively "Strata") are American companies that sought to do business in Brazil with the Brazilian national oil company, Respondent Petróleo Brasileiro, S.A. ("Petrobrás"), for the development of oil fields in Brazil. Strata and Petrobrás undertook extensive negotiations in Brazil for the development of Brazilian oilfields, and Strata's representatives traveled repeatedly to Brazil to conduct those negotiations.

As part of efforts to obtain rights to develop oilfields in Brazil, Strata executed a Memorandum of Understanding ("MOU") with Petrobrás, which addressed potential opportunities for joint ventures in Brazil. (R. at 120-14.) The MOU contained the forum selection clause set out above, which unequivocally required disputes arising out of or relating to the MOU to be arbitrated in Brazil in Portuguese. (R. at 116.) Strata also executed an Agreement for Technical Assessment ("ATA"), which allowed it to purchase technical information for $20,000.00 in order to determine whether to continue bidding for development rights. (R. at 113-98.) The ATA adopted terms of the MOU that were not expressly excluded and thus incorporated the forum selection clause requiring arbitration of any disputes in Brazil. (R. at 111.) Given that the forum selection clause was incorporated into the ATA, and given that substantial portions of the damages for which Strata sued were allegedly incurred while the MOU was in effect (*E.g.*, R. at 202-197), Strata's statements to this Court that the forum selection clause was part of "a contract that was not the subject of the litigation" (Pet. at 2) is misleading. Strata's first Question Presented, Statement of the Case,

and Statement of Facts also fail to mention that the ATA incorporated the forum selection clause. (Pet. at i, 2-5.)[1]

The transactions Strata sought to consummate with Petrobrás ultimately were not completed because of certain provisions of Brazilian law. Dissatisfied with that result, Strata brought suit in federal district court in Houston, Texas, rather than abide by the forum selection clause. Strata asserted half of its claims under Brazilian law.

Petrobrás moved to dismiss for lack of subject matter jurisdiction based on the Foreign Sovereign Immunities Act, lack of personal jurisdiction, improper venue because of the forum selection clause, and forum non conveniens. In addition to invoking Rule 12(b)(3) to assert the forum selection clause, Petrobrás asked the District Court, in the

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[1] Strata also represents to the Court that the parties "entered into" an oil and gas joint development agreement. (Pet. at 2.) That is not true. The only agreements the parties ever entered were the MOU and the ATA. Similarly, Strata's persistent references to the Heads of Agreement ("HOA"), to Strata's supposed decision not to "enforce their rights under the HOA," and to Strata's alleged claim for "breach of HOA" are baffling. (Pet. at 4-5, 9.) The HOA was never executed by Petrobrás. Even if it had been executed, it would still be unenforceable: it explicitly states that it was "not a binding agreement" and that the parties could withdraw from it "for any reason without any claim against any other party." (R. at 390-83.) Likewise, Strata's claim that "Petrobrás testified that it ordinarily placed a forum selection clause into HOA agreements" (Pet. at 9) is misguided for two reasons. First, it misstates the evidence: A Petrobrás attorney provided an affidavit stating that Petrobrás included forum selection clauses in "*binding agreements*" (R. at 497), that is, in final agreements actually consummating transactions – not in "HOA agreements," which, again are explicitly non-binding. Second, it is undisputed that Petrobrás did insist on forum selection clauses in final agreements. (R. at 497.)

alternative, to "enforce the forum selection clause and dismiss under Rule 12(b)(1), Rule 12(b)(6), 28 U.S.C. § 1406(a), or . . . for forum non conveniens." (R. at 126 n.10.) The Magistrate Judge recommended that Petrobrás' motions be denied, and the District Judge adopted the Magistrate Judge's Memorandum and Recommendation. While the Magistrate Judge concluded that the dispute did not "arise under" the MOU and the ATA and while the District Judge adopted the recommendation, neither judge considered whether the dispute at issue "relates to" the agreements containing and adopting the forum selection clause, and thus denied Petrobrás' motion to dismiss.

In an unpublished opinion, the Fifth Circuit reversed the District Court's decision based on the forum selection clause. The Fifth Circuit explained that the forum selection clause is not limited merely to disputes that "arise out of" the MOU but also encompasses disputes "relating to" the MOU such that "if Strata's causes of action relate to the MOU or the ATA, we must reverse the district court and order that it dismiss Strata's suit on remand." (Joint Appendix at 15a.) The Fifth Circuit then methodically set out how the parties' agreements interlocked, explained why this dispute is related to those agreements (Joint Appendix at 16a-18a), and concluded that the forum selection clause must be enforced:

> The district court determined that Strata's claims did not arise under the MOU, and thus declined to dismiss the suit. . . . We do not resolve whether the claims arise out of the MOU or ATA because we find the claims relate to those agreements.
>
> . . . .

> The district court erred . . . by failing to enforce the broad forum selection clause contained in the MOU requiring all disputed [sic] related to that document to be arbitrated in Brazil. In light of the interrelationship of the MOU, ATA, and HOA, we cannot say that Strata's claims under the HOA do not relate to the MOU or ATA. Accordingly, we vacate the order of the district court and remand the case with orders that the cause be dismissed.

(Joint Appendix at 14a-15a, 22a.)[2] The Fifth Circuit reached this conclusion as a matter of "interpretation of unambiguous contract language." (Joint Appendix at 20a.) The Fifth Circuit denied Strata's request for panel rehearing.

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[2] Strata's characterization of the Fifth Circuit's ruling is inaccurate. Strata asserts the Fifth Circuit "broadly determined that the forum selection clause in *the terminated confidentiality agreement*" required dismissal, completely ignoring the fact that the ATA incorporated the forum selection clause. (Pet. at 2 (emphasis added).) Likewise, Strata's contention that the "only evidence that the three agreements were related is conclusory statements made by Petrobrás in its brief on appeal" is simply untenable. (Pet. at 13.) As explained by the Fifth Circuit, the relationship among the agreements is apparent from the faces of the agreements, and the agreements' relationship to this dispute is equally apparent. Strata sought substantial damages that allegedly accrued while the MOU was in effect (*E.g.*, R. at 202-197); that belies Strata's representation to this Court that "Strata's claims in this suit arose solely after the termination of the MOU." (Pet. at 9.) Moreover, when Strata sought to buttress another argument by listing various elements of its damages in its Brief to the Fifth Circuit, the very first element Strata listed was the $20,000.00 payment it made under the ATA. (Brief of Appellees at 18-20.)

REASONS THE PETITION SHOULD BE DENIED

Strata has presented no compelling reason for this Court to grant Strata's petition for writ of certiorari. (Sup. Ct. R. 10.) In fact, Strata's arguments reveal the fact that Strata simply disagrees with the Fifth Circuit's review of the facts and its conclusion that the forum selection clause must be enforced. (*E.g.*, Pet. at 14 ("[T]he Court of Appeals . . . ignored the contracts and facts. . . .").) Conceding that the District Court's ruling "was a fact intensive determination" and "necessarily involved the facts of this case" and apparently recognizing that its first Question Presented (whether the forum selection clause should be enforced) is entirely fact-bound, Strata seeks to remake that issue into procedural and standard-of-review questions. (*Id.* at 14.) At bottom, Strata's petition is nothing more than an expression of disappointment with the Fifth Circuit's interpretation of the agreements at issue and a plea to have this Court revisit the facts. Strata's petition therefore should be denied.

1. Strata's first Question Presented is simply a fact-bound dispute of contract interpretation.

The first question that Strata presents for review is nothing more than a factual skirmish. The Fifth Circuit concluded that the forum selection clause survived and applies to this dispute, and Strata disagrees. There is no conflict of authority among the Courts of Appeals, no important federal question in conflict with a decision by a state court of last resort, no overarching legal principle, nor any other reason to warrant review by this Court. (*See* Sup. Ct. R. 10; *cf. id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly

stated rule of law.").) Strata's quibble over the facts would have little, if any, application beyond this case. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). There simply is no reason for the Court to revisit this question.

2. Petrobrás actually invoked the rule that Strata tells this Court Petrobrás should have invoked.

Perhaps aware that the first Question Presented amounts to no more than a factual dispute, Strata tries to transform that issue into questions over how a forum selection clause should be raised and how an appellate court should review a decision on a forum selection clause. Strata argues that Petrobrás should have invoked the forum selection clause under Rule 12(b)(6) and not under Rule 12(b)(3): "That issue should have been raised in either a Rule 12(b)(6) motion or a motion for summary judgment." (Pet. at 12.)

In fact, Petrobrás actually *did* raise the forum selection clause under Rule 12(b)(6). (R. at 126 n.10.) While Petrobrás asserted that venue was improper because of the forum selection clause, that was only one of five avenues Petrobrás took to invoke the forum selection clause. Because a previous Fifth Circuit case had expressly noted the "'enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed. R. Civ. P. 12(b)(1), 12(b)(3), or 12(b)(6), or 28 U.S.C. § 1406(a),'" Petrobrás asked the District Court to "enforce the forum selection clause and dismiss under Rule 12(b)(1), *Rule 12(b)(6)*, 28 U.S.C. § 1406(a), or . . . for forum non conveniens." (R. at

126 n.10 (quoting *Haynsworth v. Corporation*, 121 F.3d 956, 961 (5th Cir. 1997)) (emphasis added).)

Strata fails to mention that in its petition to this Court, leaving the Court with the impression that Petrobrás moved solely under Rule 12(b)(3). Worse yet, when Strata finally raised this issue with the Fifth Circuit (for the first time in its Motion for Rehearing), it flatly misstated what Petrobrás actually had done to enforce the forum selection clause: "Petrobrás *solely* raised the forum selection clause issue in a motion to dismiss for improper venue. . . ." (Motion for Rehearing at 3 (emphasis added).) That is simply false. Because Petrobrás actually invoked the rule that Strata curiously tells this Court should have been invoked, there is no need for this Court to consider this question. *See Rainforest Café, Inc. v. EklecCo, L.L.C.*, 340 F.3d 544, 545 n.5 (8th Cir. 2003) (declining to address whether a forum selection clause should be raised under Rule 12(b)(3) or 12(b)(6) since the defendant moved for dismissal under both subsections).

3. Strata failed to preserve error on two of its three Questions Presented.

Even if Petrobrás had not also invoked the forum selection clause under Rule 12(b)(6), Strata's petition should be denied because Strata failed adequately to raise and press these issues in the courts below and because the courts below did not pass on them.

The general rule is that this Court will not grant certiorari when the issues presented for review were not raised in the lower courts. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this

Court will not ordinarily consider them." (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). Given that the second and third questions were neither adequately raised before nor considered by the Fifth Circuit, this Court should deny Strata's attempt to advance them in this Court.

A. Strata did not contest the manner in which Petrobrás invoked the forum selection clause.

Strata waited until petitioning the Fifth Circuit for rehearing to complain about the manner in which Petrobrás invoked the forum selection clause. In the extensive briefing done before the Magistrate Judge, the District Court, and the Fifth Circuit (until Strata sought rehearing), Strata never once complained that Petrobrás' invoking the forum selection clause under a Rule 12(b)(3) motion to dismiss for improper venue was somehow deficient. Instead, Strata addressed the forum selection clause as a venue question in opposing Petrobrás' motion to dismiss. (R. at 258-52.) Strata never claimed Petrobrás had invoked the wrong rule; in its principal brief to the Fifth Circuit, Strata said only:

> This Court has held that it reviews determinations regarding the enforceability of forum selection clauses *de novo*. However, there is precedent

> that forum selection clause determinations should be reviewed under an abuse of discretion standard of review and as such should be raised under a Rule 12(b)(3) motion. *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002).[3] In any event, where the applicability of a forum selection clause depends upon disputed fact issues, those factual determinations should be reviewed under a clear error standard of review.

(Brief of Appellees at 58-59 (first citation omitted).) Beyond that, Strata said nothing about how a forum selection clause should be raised.

Such an oblique reference to a different procedural mechanism is hardly sufficient to put Petrobrás or the Fifth Circuit (let alone the Magistrate and District Judges) on notice that Strata intended to challenge the form in which Petrobrás asserted the forum selection clause. Indeed, among the eight issues Strata presented for review by the Fifth Circuit, there is no mention that Petrobrás should have invoked a different procedural mechanism for raising the forum selection issue. (Brief of Appellees at 2-6.) The Fifth Circuit certainly did not pass on this question in its primary opinion, and it never so much as mentioned Rule 12(b)(3), let alone that there was any controversy as to how Petrobrás raised the forum selection clause.

It was not until Strata moved for rehearing in the Fifth Circuit – more than two years after Petrobrás first

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[3] A petition for writ of certiorari has since been filed in that case. *See* 71 U.S.L.W. 3400 (U.S. Nov. 22, 2002) (No. 02-813).

invoked the forum selection clause – that Strata complained Petrobrás should have invoked a different rule.[4] And then, as explained above, Strata did not accurately represent what Petrobrás had done to raise the forum selection clause. It is thus clear that Strata failed properly to raise this issue in the courts below, but now, years later, Strata would have Petrobrás penalized for supposedly failing to meet a standard that Strata never attempted to invoke. Even if Petrobrás had not moved under Rule 12(b)(6) along with Rule 12(b)(3), because Strata failed adequately to raise this issue in the courts below, Strata waived it and should not be allowed to assert it for the first time in seeking certiorari in this Court.

B. Strata did not ask the Fifth Circuit to apply a different standard of review.

Strata also failed to inform the Fifth Circuit that it ought to employ a different standard of review in passing on the forum selection clause. At most, Strata merely *hinted*, or, at most implied, that some other standard of review might be appropriate by observing that "there is precedent" from another circuit for using an abuse of discretion standard. (Brief of Appellees at 58-59.) Strata never directly asked the Fifth Circuit to apply a different standard (only mentioning the Ninth Circuit's practice), never offered the slightest explanation of why a different

[4] As in its principal opinion, the Fifth Circuit did not discuss this issue in its order denying Strata's motion for rehearing.

standard of review should apply, and never suggested why that would yield a different result in this case.[5]

Even in its Motion for Rehearing, Strata still did not provide any further explanation of this issue. While Strata challenged other aspects of the Fifth Circuit's ruling on the forum selection clause, Strata once again failed to suggest that a different standard of review should apply. Even assuming that raising an issue for the first time in seeking rehearing is sufficient to preserve error, Strata failed

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[5] Strata also overstates its argument that there is a conflict in the courts of appeals regarding the standard of review applicable to determinations on forum selection clauses. Even as set out by Strata, the majority of circuits have held that the standard is *de novo*, and this clearly is the better rule. *See, e.g.*, 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3803.1 (2d ed. Supp. 2003) ("Some courts of appeals have held that the enforceability of a forum-selection clause is reviewed for abuse of discretion. But many recent cases have held – correctly it would seem – that this is a question of law so that the district court's decision is reviewable de novo.") (footnote omitted). The only two cases that Strata cites as applying an abuse of discretion standard are from the Eighth and Ninth Circuits, both of which have limited the application of an abuse of discretion standard.

The Eighth Circuit has held that "de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in the forum selection clause," and has noted that the "Ninth Circuit itself has refined its approach and has explained that it employs de novo review when a district court is required to interpret the language of a forum selection clause." *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997). Similarly, the Ninth Circuit has noted that "whether the parties agreed to a forum selection clause is a question of law that we review de novo." *Chateau des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328 F.3d 528, 530 (9th Cir. 2003). Given that Strata complains about "whether the forum selection clause in the MOU was *intended by the parties* to control all future agreements or actions between them" (Pet. at 13 (emphasis added)), it appears that even the Eighth and Ninth Circuits would employ a *de novo* standard of review in this case.

expressly to ask the Fifth Circuit to use a different standard and should be held to have waived this issue.

4. Even under the rules that Strata espouses, the forum selection clause would be enforced.

Even if the Court accepts Strata's arguments that Petrobrás invoked the wrong rule to raise the forum selection clause and that the Fifth Circuit then applied the wrong standard of review, there is no indication that either argument would make a difference to the outcome of this dispute.

A. The Fifth Circuit likely would reach the same conclusion under a different standard of review.

Applying the standard of review Strata promotes would have no impact on the Fifth Circuit's clear and unequivocal decision. As set out above, the Fifth Circuit easily concluded, as a matter of "the interpretation of unambiguous contract language," that the dispute relates to the agreements containing and adopting the forum selection clause. (Joint Appendix at 15a, 20a). As repeatedly stressed by Petrobrás both in its objections to the Magistrate Judge's Memorandum & Recommendation and in its briefs to the Fifth Circuit, the District Court and the Magistrate Judge failed to consider the second prong of the forum selection clause ("arising out of *or relating to*"), instead merely addressing whether the parties' dispute "arose out of" the operative documents. (*See, e.g.*, Brief of Appellant at 13-14, 43-45; R. at 536, 513-09.) The Fifth Circuit squarely accepted Petrobrás' argument, concluded that the District Court erred "by failing to enforce the

broad forum selection clause," and reversed accordingly. (Joint Appendix at 14a-15a.)

Strata has failed to suggest why it would not be an abuse of discretion simply to ignore half of a forum selection clause. *Cf. In re Sealed Appellant*, 194 F.3d 666, 670 (5th Cir. 1999) ("A district court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."). Indeed, there is no reason to think that, when a trial court wholly fails to consider half of an applicable standard, the result would be any different under an abuse-of-discretion standard than under a *de novo* standard.

It thus appears that the Fifth Circuit, under either a *de novo* standard or an abuse of discretion standard, would have found that the lower courts erred in disregarding the plain language in the agreements requiring arbitration in Brazil. The Fifth Circuit simply reversed the District Court for failing to consider the express language in the contract. It was clear to the Fifth Circuit that "the outcome of this appeal depends entirely on the interpretation of unambiguous contract language." (Joint Appendix at 20a.)[6]

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[6] This Court has long held that forum selection clauses are presumptively valid and, absent exceptional circumstances, should be enforced. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 19-20 (1972); *see also Haynsworth v. Corporation*, 121 F.3d 956, 962 (5th Cir. 1997) (noting this Court's holding in *The Bremen* "that federal courts presumptively must enforce forum selection clauses in international transactions" and noting that since this Court's decision in *The Bremen*, this Court "has enforced every forum selection clause in an international contract that has come before it").

B. Even if Strata had timely complained that Rule 12(b)(3) was not the means by which to assert a forum selection clause, that is the better practice.

Strata's position that a party cannot raise a forum selection clause by a Rule 12(b)(3) motion clearly is the minority view. One leading commentator has observed that, even though courts are split on which 12(b) motion should be used where a forum selection clause makes a particular state or foreign court the exclusive forum, the position that a Rule 12(b)(6) motion to dismiss is better (as Strata asserts here) is the "minority view" and has been "correctly criticized" on several grounds. *See* 17 James Wm. Moore, *Moore's Federal Practice* § 111.04[3][b][ii] (3d ed. 2003). The prevailing view is that a Rule 12(b)(3) motion is the correct way to raise a forum selection clause. And regardless of which rule is invoked (or whether, as here, both are invoked), the "result . . . is almost certain enforcement of the clause through dismissal or remand, regardless of the means used to raise the issue." *Id.* § 111.04[3][a].

At the end of the day, Petrobrás invoked the correct rules, and the Fifth Circuit correctly applied the proper standard of review. There is no reason to think that, even if Strata had timely raised the issues it now asserts, the result would be otherwise. Moreover, Strata is decidedly *not* left without any avenue of relief. Strata still has the remedy to which it agreed – arbitration in Brazil.

5. The Fifth Circuit's opinion is unpublished and of little precedential value.

Because the Fifth Circuit's opinion is unpublished, it will have little impact beyond this case. (Joint Appendix at 4a.) Under Fifth Circuit Local Rule 47.5.4, unpublished opinions are only persuasive – not precedential. (5th Cir. R. 47.5.4. ("Unpublished opinions issued on or after January 1, 1996, are not precedent. . . . An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited. . . .").) Thus, even if this Court disagrees with the Fifth Circuit's disposition of the forum selection clause, there is no need for the Court to correct that decision for purposes of future decisions.

CONCLUSION

This case presents no issue worthy of the Court's attention, and the Fifth Circuit's decision to enforce the forum selection clause was correct. The petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 03-313

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In The
Supreme Court of the United States

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION and HEIGHTS ENERGY CORPORATION,

Petitioners,

v.

PETROLEO BRASILEIRO, S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. In a contract between United States corporations and a foreign corporation there is a forum selection clause that mandates that disputes concerning or relating to the contract be resolved in arbitration in a foreign country. The contract has a survivability clause that does not provide for the extension of the forum selection clause. After the termination of the contract, does the forum selection clause govern every other subsequent contract or tortious act between those entities?

2. What is a court of appeal's proper standard of review over a district court's order on a motion to dismiss due to a forum selection clause?

3. What is the proper procedural vehicle to raise a forum selection clause issue?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (hereinafter referred to collectively as "Strata") respectfully file this Reply Brief to Petroleo Brasileiro, S.A.'s ("Petrobras") Brief in Opposition.

I. This Case Perfectly Presents An Opportunity to Resolve Several Important Issues in International Business Litigation

This case brings three important and related issues to this Court – 1) whether a forum selection/arbitration clause in an expired agreement can bar all of a party's claims that arose from agreements and conduct that were entered into and occurred after the termination of the initial agreement; 2) whether the court of appeals' standard of review is de novo on a forum selection clause issue; and 3) what the correct procedural vehicle is to raise a forum selection clause issue. Due to the importance of international commerce, these issues are of great importance to the public in general. Further, the courts of appeals have conflicting opinions on these issues. Accordingly, this Court should grant the Petition for Writ of Certiorari.

II. Factual Disagreements

Petrobras makes several accusations in its Brief in Opposition that must be addressed. First, on page 2, Petrobras asserts that Strata's statement that the forum selection clause was part of a "contract that was not the subject of the litigation" is misleading. However, this

statement was accurate. The only agreement that expressly contained the forum selection clause was the MOU.[1] The MOU was a preliminary agreement to provide Strata certain information in order for them to evaluate whether they wished to continue negotiations and wished to provide recommendations to Petrobras under another agreement – it was a confidentiality agreement. (R. 213-212). Strata and Petrobras did not raise any claims that dealt with the unauthorized disclosure of information, the failure to return information, or any other topic covered by the MOU. Further, the forum selection clause was not

[1] Strata and Petrobras entered into a Memo of Understanding ("MOU") on June 11, 1997, that governed issues of confidentiality so that Petrobras could disclose various projects available for joint development. (R. 227). After reviewing the proposed projects, Strata selected two projects (BES-1 and BFS-1) to do a technical review, and after Petrobras confirmed that they were available, the parties entered into an Agreement on Technical Assistance ("ATA") on August 4, 1997. (R. 227, 212-211). The ATA was an agreement whereby Strata, having reviewed the information provided under the MOU, made recommendations with respect to exploration of oil and gas prospects and/or enhancement of marginal fields. (R. 212-211). Under the ATA, Strata released data to Petrobras on specified areas or projects with respect to technical and economic evaluations. (R. 212-211). To enter into a joint venture to develop oil and gas properties, the parties were required to negotiate another independent agreement aside from the ATA and MOU. The Heads of Agreement ("HOA") is a separate agreement from the MOU and the ATA and is one of the bases of the underlying suit. After years of negotiation, Petrobras and Strata contracted and agreed to all material terms of the HOA for enhancement of three marginal fields in Brazil – it was a joint development agreement. (R. 227, 223). Petrobras prepared the HOA and it was executed by Strata on July 30, 1999. (R. 223). When Strata signed the HOA, Petrobras represented that it approved the HOA's execution but that its signatory officer was out of the office that day and that the HOA would be signed by Petrobras when he returned. (R. 223).

expressly included in the ATA, it was incorporated by reference, as were all the other provisions of the MOU.

The ATA was an agreement whereby Strata, having reviewed the information provided under the MOU, made recommendations with respect to exploration of oil and gas prospects and/or enhancement of marginal fields. (R. 212-211). As made clear by the terms of the ATA, no agreement for joint activities had been entered into, and the agreement was simply a vehicle by which the parties continued to assess whether they wished to enter into joint ventures and joint activities. (R. 212-211). It also dealt with the exchange of information. Strata and Petrobras did not raise any claims that dealt with the ATA. Strata's claims are factually based upon agreements, promises and conduct that occurred after the termination of the MOU. Accordingly, Strata's statement was correct.

Further, in Footnote 1, on page 3, Petrobras alleges that Strata made a false statement in saying that the parties "entered into" an oil and gas joint development agreement. However, the evidence shows that after years of negotiation, Petrobras and Strata contracted and agreed to all material terms of the HOA for enhancement of three marginal fields in Brazil. (R. 227, 223). In Strata's Petition (pg. 4), it was forthcoming with the fact that despite promises to sign the HOA, Petrobras refused to do so. However, there is Texas state common law and Brazilian law that would allow the parties' agreement and Petrobras' promises to be enforced. Accordingly, Strata's statement is true, the parties did enter into an agreement.

Lastly, Petrobras complains that Strata failed to state that the ATA incorporates all of the MOU's provisions, including the forum selection clause. However, that fact is

not procedurally or substantively significant. Strata did not sue over the ATA. Further, the ATA's incorporation of the provision could not expand its scope – which was solely related to the MOU: "Any dispute, controversy or claim arising out of or relating to ***this MOU or the breach, termination of invalidity hereof***, which cannot be settled amicably between the parties shall be settled by arbitration to be conducted in Rio de Janeiro in the Portuguese language." (R. 116). Further, as the ATA incorporated the forum selection clause, it also incorporated the term of the clause which mandated that the clause expired before the relevant conduct in this suit transpired.[2] Accordingly, the ATA's incorporation makes no difference in this case.

III. Application of the Forum Selection Clause in This Case Is More Than Fact Based, and Presents Important Questions For This Court's Consideration

Petrobras attempts to dissuade this Court from granting Strata's Petition by stating that it brings nothing more than a fact based issue that has no importance.[3]

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[2] Paragraph 2.1 of the MOU provided that it was binding for a period of twelve (12) months from the date of execution, and that it could be extended or rescinded by mutual agreement of the parties upon thirty (30) days' prior written notice to the other party. (R. 119-18). Neither Strata nor Petrobras extended the MOU, and it expired on June 11, 1998. (R. 213-211). Petrobras agreed to enter the HOA in July of 1999, and made its fraudulent misrepresentations in September of 1999. (R. 223, 226).

[3] If this Court had a dime for every time a respondent stated that the petition only brought forth factual issues, the national debt would surely be erased.

However, this case deals with large international issues that are important to the jurisprudence and the public in general. This case involves whether the federal court's broad application and construction of forum selection/arbitration clauses should be extended to reach to situations where such an application is contrary to the written intention of the parties to a contract. That is, will the court's broad application of arbitration clauses as a matter of policy override the intention of the parties. On a daily basis, United States' companies enter into agreements with international companies – and often it is not the parties' first agreement. Should a forum selection clause in an initial, expired agreement control all disputes the parties have that revolve around other agreements? This issue is squarely brought to this Court in this case. True, the issue does rest to some extent on the facts of this case (as all issues before this Court do). However, this issue is certainly broad and important enough to justify this Court granting Strata's Petition.

Before a court should compel arbitration, it must find that there is a binding arbitration agreement between the parties, and if so, find that the plaintiff's claims fall within the scope of the arbitration agreement.[4] *See Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001). In determining whether a claim falls within the scope of an arbitration agreement, courts should focus on the factual underpinnings of the claim. *See Medtronic Ave. Inc. v.*

[4] As the forum selection clause provided that disputes relating to the MOU would be arbitrated in Brazil, Strata refers to the provision as a forum selection/arbitration clause and cites to precedent discussing both forum selection clauses and arbitration clauses.

Advanced Cardiovascular Systems, Inc., 247 F.3d 44 (3rd Cir. 2001).

In this case, there was a forum selection/arbitration clause in a preliminary, independent agreement between Strata and Petrobras – the MOU. (R. 116). The MOU was a confidentiality agreement with respect to the information Petrobras provided to Strata in the initial stages of their negotiations for a joint venture of certain oil and gas properties situated in Brazil. The forum selection/arbitration clause was solely related to the MOU. (R. 116). The claims in this suit, however, do not arise out of or relate to the MOU. Accordingly, the Court of Appeals erred in finding that the forum selection/arbitration clause applies and in ordering that the case be dismissed.[5]

This holding was consistent with prior opinions written by the Fifth Circuit dealing with the applicability of an arbitration provision in one contract controlling disputes over other contracts that did not contain such a provision. *See, e.g., Personal Sec. & Safety Sys. v. Motorola, Inc.*, 297 F.3d 388, 393-94 (5th Cir. 2002); *Pennzoil Exploration & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998). These holdings obviously do not contemplate that parties may include forum selection/arbitration provisions

[5] The Court of Appeals erred in finding that this case should be dismissed if Strata's claims "related to" the ATA. *See* Joint Appendix 15a. The clause specifically limits its application to the MOU. Certainly, if the Parties had so desired they could have expanded the clause's scope – but they did not. *See, e.g., Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (4th Cir. 1998) (arbitration clause in one contract applied to dispute over other agreement where clause applied to "any aspect of the relationship" between the two parties).

in some agreements but intentionally exclude them from others.

Other courts, however, have held that an arbitration provision in one agreement does not control disputes over another agreement. *See Specht v. Netscape Commun. Corp.*, 306 F.3d 17, 36-37 (2nd Cir. 2002) (court affirmed denial of arbitration motion where arbitration clause in one licensing agreement did not effect claims raised under separate agreement); *Arco Corp. v. Anglin*, 216 F.3d 589, 595 (7th Cir. 2000) (court reversed arbitration award as it covered claims based upon a retail agreement where only a guarantee agreement contained the arbitration clause); *Industrial Elecs. Corp. v. iPower Distrib. Group*, 215 F.3d 677, 680-81 (7th Cir. 2000) (court affirmed denial of arbitration where arbitration clause in franchise agreement did not control dispute over association agreement); *Security Watch, Inc. v. Sentinel Sys.*, 176 F.3d 369, 372-73 (6th Cir. 1999) (court affirmed denial of arbitration where dispute over earlier contract was not controlled by arbitration provision in later contract); *ITT Hartford Life & Annuity Ins. Co. v. Amerishare Investors*, 133 F.3d 664, 668-70 (8th Cir. 1998) (court affirmed denial of arbitration where arbitration in marketing agreement did not control dispute over guarantee and notes); *International Amb. Programs v. Archexpo*, 68 F.3d 337, 339-40 (9th Cir. 1995) (court ordered that dispute over a contract should not have been arbitrated and a judgment based thereon was valid even though there was an arbitration award based on a separate contract); *Swenson's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1310 (8th Cir. 1991) (court affirmed denial of arbitration where arbitration clause in franchise agreements did not control dispute over distribution agreement); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339,

344-45 (8th Cir. 1990) (court affirmed denial of arbitration where arbitration clause in settlement agreement did not control dispute over non-disclosure agreement); *Battaglia v. McKendry*, No. 98-5321, 2002 U.S. Dist. LEXIS 2805 (E. D. Penn. February 21, 2002); *Magellan Real Estate Inv. Trust v. Losch*, 109 F.Supp.2d 1144, 1159 (D. Ariz. 2000); *Weber v. Hall*, 929 S.W.2d 138, 142-43 (Tex. App. – Houston [14th Dist.] 1996, orig. proc.); *Jacobson v. Mailboxes Etc.*, 646 N.E.2d 741, 745 (Mass. 1995); *Crowson v. Sealaska Corp.*, 705 P.2d 905, 910 (Alaska 1985).

Whether Strata's claims based upon promises and representations in the HOA and fraudulent conduct after the HOA are related to an expired forum selection/ arbitration clause in a separate confidentiality agreement is an important question. True, the facts of the case do play some part in the determination. But the bigger picture shows that this case presents this Court with an opportunity to give parties and courts guidance as to the breadth of forum selection/arbitration provisions in contracts where the parties' dispute centers around another contract. Specifically, this Court has the opportunity to rule upon the tension of enforcing a policy to give broad application to forum selection/arbitration clauses against the contrary intentions and expectations of the parties to the contract. *See Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). The courts of appeals seem at odds on this issue, it is very important to the public in general, and this Court should grant Strata's Petition.

IV. Vehicle to Raise Forum Selection Issue and Standard of Review Are Important Issues That This Court Should Address

In addition to the important issue regarding the breadth of a forum selection/arbitration clause in an expired agreement, this Court should also review the important issues concerning the appropriate procedural vehicle to raise a forum selection clause and the appropriate standard of review over that determination. District courts and courts of appeals face these issues every day – there are few issues that are more often addressed by the lower courts. Further, as set forth in Strata's Petition, there is currently a split in the courts of appeals concerning those issues. In fact, Petrobras' admitted shotgun approach at raising the forum selection clause is evidence as to the great confusion that exists in the lower courts as to the appropriate vehicle to raise the issue.

Petrobras argues that Strata did not raise these issues below, but it did. First, Strata raised the issue of what the appropriate procedural vehicle is for raising a forum selection clause in its motion for rehearing to the Court of Appeals. The Court of Appeals decided not to issue a new opinion and address the issue, but the issue was squarely presented to the Court. Further, Strata presented the Court of Appeals with conflicting case law on the appropriate standard of review over a forum selection issue in its Brief of Appellees – the Court of Appeals used the standard that it had previously used in prior cases. Therefore, these two fundamental, important issues were raised below, and this Court has the authority to grant Strata's Petition and address them and clarify this confused area of the law.

V. Conclusion

Strata requests that this Honorable Court grant their petition for a writ of certiorari because this case presents important questions of international trade and commerce and because there is currently conflict between the courts of appeals regarding the proper procedural device to raise a forum selection clause issue and the appropriate standard of review over the determination of that issue.

Respectfully submitted,

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